

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1313

To be argued by
PETER R. CASEY, III

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos.

	77-1313		
77-1317	77-1350	78-1033	78-1084
77-1344	77-1355	78-1082	78-1085
77-1347	77-1367	78-1083	78-1090

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY D. VOLPE, MICHAEL O'BRIEN,
LAWRENCE DiBENEDETTO, JOHN T. DELLA FERRA,
CHARLES BOORNAZIAN, EUGENE POULIN, WILLIAM JACOMINI,
RICHARD BOVINO, ROBERT E. MORRIS, FRANK CECCHINI,
GEORGE SPEZIALE, and JOHN LEPITO, Appellants.

UNITED STATES OF AMERICA, Appellee,

v.

ANTHONY D. VOLPE and DENNIS BYRNE, Appellants.

UNITED STATES OF AMERICA, Appellee,

v.

ANNE STEFANOU, Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE APPELLEE

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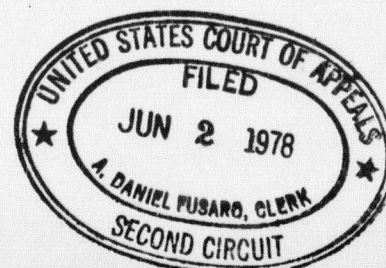


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CITATION OF STATUTES*

18 U.S.C. § 2510. DEFINITIONS

As used in this chapter--

(1) "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

(2) "oral communication" means any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation;

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States;

(4) "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.

(5) "electronic, mechanical, or other device" means any device or apparatus which can be used to intercept a wire or oral communication other than--

(a) any telephone or telegraph instrument, equipment or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties;

(b) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

*

The Statutes with which the appellants were charged and convicted are found at pages v - x of Appellant's Brief.

(6) "person" means any employee, or agent of the United States or any State or political subdivision thereof, and any individual, partnership, association, joint stock company, trust, or corporation;

(7) "Investigative or law enforcement officer" means any officer of the United States or of a State or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(8) "contents", when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, purport, or meaning of that communication;

(9) "Judge of competent jurisdiction" means--

(a) a judge of a United States district court or a United States court of appeals; and

(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(10) "communication common carrier" shall have the same meaning which is given the term "common carrier" by section 153(h) of title 47 of the United States Code; and

(11) "aggrieved person" means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed.
Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 212.

18 U.S.C. § 2518. PROCEDURE FOR INTERCEPTION OF WIRE OR
ORAL COMMUNICATIONS

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that--

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify--

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian or other person shall furnish the applicant forthwith all information, facilities, and technical assistance necessary to accomplish the interception

unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian or other person furnishing such facilities or technical assistance shall be compensated therefor by the applicant at the prevailing rates.

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purpose for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

(7) Notwithstanding any other provision of this chapter, any investigative or law enforcement officer, specially designated by the Attorney General or by the principal prosecuting attorney of any State or subdivision thereof acting pursuant to a statute of that State, who reasonably determines that--

(a) an emergency situation exists with respect to conspiratorial activities threatening the national security interest or to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing such interception can with due diligence be obtained, and

(b) there are grounds upon which an order could be entered under this chapter to authorize such interception.

may intercept such wire or oral communication if an application for an order approving the interception is made in accordance

with this section within forty-eight hours after the interception has occurred, or begins to occur. In the absence of an order, such interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event such application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been obtained in violation of this chapter, and an inventory shall be served as provided for in subsection (d) of this section on the person named in the application.

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of the issuing or denying judge.

(d) Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7) (b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to

intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of--

- (1) the fact of the entry of the order of the application;
- (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and
- (3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(9) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --

- (i) the communication was unlawfully intercepted;
- (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
- (iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make such motion or the person

was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted. Added Pub.L. 90-351, Title III, § 802, June 19, 1968, 82 Stat. 218 and amended Pub.L. 91-358, Title III, §211(b), July 20, 1970, 84 Stat. 654.

STATEMENT OF THE CASE

The United States is satisfied with the Statement Of The Case found at pages xiv-xxv of the Appellants' Brief. Due to the length of the papers before the Court in this matter, no purpose would be served by repetition and we therefore exercise our option, under Rule 28(b) of the Federal Rules of Appellate Procedure to omit the statement.

STATEMENT OF THE FACTS

The Appellants do not challenge the sufficiency of the evidence upon which the jury convicted them. For that reason, as well as the volume of the evidence presented and the complexity of the facts relating to the pre-trial issues, the Government will not present a formal statement of the facts. However, the facts relevant to the individual arguments are set forth in the body of this brief.

It should be noted, however, as an overview, that the Government offered proof that Michael O'Brien and Anthony Volpe were partners in an illegal enterprise. As such they conducted a substantial illegal gambling business, collected debts owed to the business through the use of threats of force and violence, collected debts owed to others, and loaned money at usurious interest rates. The proof of these facts came primarily from the oral and wire interceptions, the legality of which is the primary question before this Court; the testimony of two individuals, who came to the Government's attention through the electronic surveillance, who were intimately involved in activities with O'Brien and Volpe; and the testimony of witnesses who had either taken loans or were the victims of the enterprise's debt collection activities, and who, with one exception, also came to the Government's attention through the electronic surveillance. The

Appellants put the Government's witnesses through grueling and exhaustive cross-examination. They called witnesses who challenged the accuracy of the testimony and evidence produced by the Government, and the credibility of a key Government witness. Parties to certain conversations, who were not called as Government witnesses, denied that the Government's interpretation of the calls was correct. In short, the trial was a hard fought affair. Ultimately, the jury chose the Government's evidence, and the testimony and credibility of its witnesses, over the evidence and testimony offered by the Appellants, with the exception of the Appellant DiBenedetto's acquittal on the gambling charges. That then, in summary fashion, is the posture of the case as it comes before this Court.

ARGUMENT I

THE AFFIDAVIT SUBMITTED TO THE COURT IN DECEMBER, 1974 CONTAINED SUFFICIENT INFORMATION TO PERMIT THE DISTRICT COURT TO REASONABLY CONCLUDE THAT OTHER INVESTIGATIVE MEANS HAD BEEN, OR WOULD BE, UNLIKELY TO SUCCEED IN REVEALING THE SCOPE OF, OR ALL THE PARTICIPANTS IN, THE
ILLEGAL GAMBLING BUSINESS

The Appellants argue that Agent Santacrocce's affidavit was insufficient, on the question of whether normal investigative techniques could have been successfully utilized, because it recited "boilerplate language", was similar to that rejected by the Ninth Circuit in United States v. Kalustian, 529 F.2d 585 (9th Cir. 1976), and because, they allege, an undercover agent could have penetrated the operation and gathered the quantum of evidence necessary for a prosecution under Title 18, United States Code, Section 1955.^{1/} In reading Appellants' description of the reasons given by Agent Santacrocce as to why alternative means would not suffice one would have to conclude that, he was only reciting boilerplate conclusions and that no other techniques had actually been tried. This notion, which the Appellants attempt to foster, is quickly dispelled by a review of the District Court's findings of fact:

Section 1955 requires proof that five or more individuals participated in a gambling business, which was in violation of state law, and which had been in substantially continuous operation for a period in excess of 30 days, or had a gross revenue of \$2,000 in any single day.

"The affidavit of December 16, 1974 was sufficient to conclusively demonstrate to this Court, that the use of standard investigative techniques, other than wire or oral intercept, would be unlikely to succeed. The affidavit summarized the continued physical surveillance by the police between August and December of 1974. (In chambers Tr., December 16, 1974, at 5-31). While ordinary searches might lead to the arrest of certain bookies for making individual sales, the full nature of the operation with the placement of bets and the collection of indebtedness would not be uncovered. The local police had searched the premises twice with unsatisfactory results. Grand Jury techniques would not be successful because the informants refused to testify, out of a real fear of physical harm. The immunization of witnesses was not likely to uncover the scope of the gambling operation and would be likely to abort the investigation. The suspects were cautious, and were known to have taken steps to avoid detection; total telephone service was in effect, by means of which phone calls could be automatically switched to unknown destinations; and the use of toll call records would not be productive, because calls were generally not being made outside of the non-toll call area. Undercover agents would not be likely to gain the confidence of the participants in the operation to determine its true scope of the inside financing and management. (Aff., Agent Santacroce at 33-34). All of the aforesaid information was adequately set out in much detail and supported by the oral testimony of Agent Santacroce at the December 16, 1974 recorded chambers hearing. The latter agent is generally recognized to be most reliable investigator, with 21 years of general experience in the FBI and 5-6 years of 'street experience' in this type of gambling operation." ^{2/} (Ruling on Motion to Suppress, App. pp. 116-117).

Despite Judge Clarie's findings of fact, the Appellants continue to rely for support on United States v. Kalustian, 529 F.2d

^{2/} The affidavit contained detailed descriptions of twenty-two surveillances conducted between August 2 and November 27, 1974 (Supp. App., Dec. Aff., pp. 12-28). It also contained information that wagers were recorded with grease pencil on a glass desk top so that they could be quickly erased (Supp. App., Dec. Aff., p. 8; Tr., Dec. 16, 1974, p. 21). Toll call analysis had been attempted (Supp. App., Dec. Aff., p. 22).

585 (9th Cir. 1976), which held that the Government must inform the authorizing court of every customary investigative technique, and explain why each has failed or, factually, why each is unlikely to succeed. This Circuit however, has taken a more realistic view of the requirement. The affidavit in United States v. Steinberg, 525 F.2d 1126 (2d Cir. 1975), cert. denied, 425 U.S. 971 (1976), contained fewer "facts" than in this case or Kalus-tian. Nevertheless, this Court stated the following:

"Although the affidavit provides little factual basis for concluding that normal investigative techniques had not 'suffice[d] to expose the crime', . . . paragraphs (1)(c) and (3)(c) of §2518 are in the disjunctive; and the Government's main reliance is upon the second alternative provided by the statute. We must view the affidavit as a whole and 'in a practical and commonsense fashion', . . . While the Government will be well advised in the future to include a more detailed factual statement indicating the inadequacy of other investigative techniques, the affidavit herein did contain enough data to permit the authorizing judge reasonably to conclude that other means would be unlikely to succeed in revealing the scope of Steinberg's operation and his sources of supply.

When one endeavors to prove a negative, it is difficult to be very specific about it; and we are loathe to set impossibly burdensome standards . . . We are satisfied that the Government has substantially complied with the statutory mandate, and note that on oral argument appellants could advance no logical alternative to wiretapping . . . Indeed, wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation." United States v. Steinberg, supra, 525 F.2d at 1130 (citations omitted); See also, United States v. Schwartz, 535 F.2d 160 (2d Cir. 1976), cert. denied, 430 U.S. 906 (1977);

United States v. Hinton, 543 F.2d 1002, 1101
(2d Cir. 1976), cert. denied, 429 U.S. 1051,
1066 (1977). 3/

Although United States v. Steinberg, Id. made clear that not every investigative means need be tried, the Appellants claim that the placing of wagers by an Alcohol, Tobacco and Firearms agent with the gambling operation subsequent to the wiretap proved the feasibility of undercover infiltration and makes Agent Santacroce's representation "boilerplate". Again, the District Court's findings of fact on this topic are instructive.

"While the ATF agent testified that he had met the defendant O'Brien in August, 1975, (Tr. 454), and had placed bets with him on several occasions, (Tr. 461), he believed that there were five or more people involved and that the operation was in business for more than 30 days, but he did not know the gross revenue in a single day. He knew several of the defendants with whom he placed separate bets, but did not know whether or not they were in business with O'Brien, (Tr. 465) because several were in business on their own.

3/ This Circuit's view is supported by the legislative history of Section 2518(1)(c):

"Subparagraph (c) requires a full and complete statement as to whether or not normal investigative procedures have been tried and have failed or why these are unlikely to succeed if tried, or to be too dangerous . . . The judgment would involve a consideration of all the facts and circumstances . . . Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely . . . What the provision envisions is that the showing be tested in a practical and commonsense fashion." S.Rep. No. 1097, 90th Cong., 2d Sess., 1968, U.S. Code and Admin. News, pp. 2112, 2190 (citations omitted; emphasis added).

When pressed to say if he could determine whether or not there were five or more persons in this gambling operation at 103 New Britain Avenue, who conducted, financed, managed, supervised, directed or owned all or part of the business, Agent Comforti responded, "I could say that one could fit that category, Mr. O'Brien". He testified that O'Brien had offered to pay him a percentage of any bets he could bring in to him. (Tr. 502-503). Furthermore, the telephone number given to him, where he might place bets with O'Brien was 247-0177, a number different from the phone on the above premises

Agent Comforti was frank to admit, that except for the specific identity of four people with whom he placed bets to establish the crime of accepting wagers without paying an occupational tax, his observations and information did not encompass the required evidence to successfully prosecute a Title 18, United States Code §1955 violation (Tr. 520-523). None of the information procured by the ATF agent was exchanged or passed on to any other federal law enforcement agency (Tr. 527). The Court has concluded that from the nature of the evidence obtained by the ATF agent, the likelihood of a successful §1955 criminal prosecution could not have been achieved by the infiltration process." (Ruling on Motion to Suppress, App., pp. 121-122) (emphasis added). 4 /

Regardless of what was later achieved on a more limited scope, the point is that Agent Santacroce gave the authorizing

4 / It is interesting to note that the Appellants ignore the testimony of one of their own witnesses, Trooper Ronald Hart, an undercover operative with the Connecticut State Police, who testified that the State Police had attempted and failed to infiltrate 103 New Britain Avenue in 1972 (Vol. IV, p. 392). He testified, in his opinion, that an undercover agent would be unable to identify the total scope, participants and nature of an operation such as is found in this case (Vol. IV, pp. 392-394).

judge valid reasons, backed by specific facts, which led him to believe that other investigative techniques, including the use of undercover agents, were unlikely to succeed. The Court was satisfied that the actual steps taken, and the representations made, provided a sufficient justification for the use of electronic surveillance. The statute requires no more, and, we respectfully suggest, the decision of the District Court ought to be upheld.

ARGUMENT II

THE DISTRICT COURT CORRECTLY REFUSED TO SUPPRESS THE FRUITS OF AN ELECTRONIC SURVEILLANCE FOR FAILURE TO COMPLY WITH 18 U.S.C. §2518(1)(e) WHERE THE FAILURE WAS UNINTENTIONAL, THERE WAS SUBSTANTIAL COMPLIANCE WITH THE DICTATES OF THE STATUTE, AND THE CRITICAL STATUTORY PRECONDITIONS TO AUTHORIZE WERE SATISFIED

PERTINENT FACTS

The affidavit sworn to by Agent Santacrocce on December 16, 1974, and incorporated by reference in the Government's application for electronic surveillance, contained a section (paragraphs 8-10) setting forth previous applications for wire interceptions (Supp. App., Dec. Aff., pp. 5-7). It pointed out that Michael O'Brien, one of the named subjects in the application, had been intercepted on some twenty-two occasions between March 22 and April 1, 1973, during the course of another federal wiretap. The affidavit also contained information that another named subject had been intercepted during the course of a federal wiretap in November, 1971. During the evidentiary hearing concerning this case, it developed that Michael O'Brien and the premises of 103 New Britain Avenue had been the subject of a State wiretap in September, 1972 (Motion to Suppress, App., Def. Exhibit 8, p. 39). Representatives of the State of Connecticut testified that no information concerning the existence of the State tap was ever disseminated to the federal government (Vol. IV, p. 368, 396-

397, 406-409, 417, 419; Vol. V, pp. 675-676). The extent and exact nature of this electronic surveillance is still unknown. Although Lieutenant Bernard Sullivan of the Hartford Police Department had assisted the State officers, prior to the implementation of the tap, he was never told by the State whether or not the tap had actually occurred (Vol. IV, pp. 400, 419, 424-246). Lt. Sullivan, who worked with Agent Santacrocce on the investigation of this case (Vol. IV, p. 429), testified that although he subsequently concluded, in December, 1972, that there had been a wiretap (Vol. IV, p. 428), he never told Agent Santacrocce, or any other federal agent, about it (Vol. IV, pp. 432-433; Vol. V, pp. 682-683). He was not aware of the federal law requiring disclosure of all previous applications (Vol. V, p. 683).

Agent Richard Ludwig, who also worked with Agent Santacrocce on this investigation, testified that he had clipped an article concerning State arrests (including that of Michael O'Brien) stemming from a wiretap out of the Hartford Courant and sent it to the F.B.I. Office in New Haven (Vol. VI, p. 799). He had the clipping placed in the file of Jacob Schneider (Vol. VI, p. 801). He did not recall ever discussing the article with Agent Santacrocce (Vol. VI, p. 803). He was never informed by the State as to the existence of the tap, or of its contents (Vol. VI, pp. 803-815). He also testified that he had participated with Agent Santacrocce in a 1973 interview of Michael O'Brien in which O'Brien had mentioned that he felt that a "bug" found in a friend's apartment

had been placed there by the State Police because they had previously arrested him for a wiretap (Vol. VI, p. 804).

Agent Santacroce testified that he knew of the State arrests, but not of the State wiretap (Vol. III, p. 95; Vol. V, pp. 710-711, 712). He had searched the O'Brien file in preparing his affidavit and had seen no newspaper clippings referring to a State wiretap (Vol. V, p. 711). At the request of the Court, Agent Santacroce searched the F.B.I. files in New Haven and found the article clipped by Agent Ludwig in the file of Jack Schneider (Vol. VI, p. 747).^{5/} He testified that prior to December 16, 1974, he had no reason to believe that such an article would be in Schneider's file (Vol. VI, p. 748).^{6/} In response to a question by the Court, Agent Santacroce stated that he would have included information on the State tap if he had known about it (Vol. V, pp. 712-713; see also, Vol. VI, pp. 754-755). Agent Santacroce also testified that in reviewing the files he had found a report of the interview with Michael O'Brien, in a file marked "unknown subject", in which O'Brien had made reference to having been arrested as a result of a State wiretap (Vol. VI,

^{5/} Schneider was not one of the individuals named in the December or January affidavits, applications or Orders.

^{6/} Although the article mentioned O'Brien, it gave the address 100 Bond Street (Vol. VI, p. 749; App., Motion to Suppress, Government Exhibit 5, p. 34).

pp. 770, 771). The interview occurred on September 10, 1973 (Motion to Suppress, App., Def. Exhibit 9, p. 68). Santacroce stated that he had probably looked at the report while reviewing files prior to December 16, 1974 (Vol. VI, p. 775), but that he had apparently missed the reference to a wiretap (Vol. VI, p. 776). He testified that he had simply forgotten about the interview by the time the electronic surveillance application was made to the Court (Vol. VI, p. 775).

ARGUMENT

The Appellants argue that the District Court erred in refusing to suppress the electronic surveillance because Agent Santacroce's affidavit failed to include the fact of the 1972 State wiretap application. They argue that compliance with Section 2518(1)(e) is a "stringent pre-condition" to the issuance of an interception order and the fact that the omission was unintentional is of no consequence. In making these arguments, the Appellants rely, in large part, upon the decision in United States v. Bellosi, 501 F.2d 883 (D.C.Cir. 1974), in which the Court of Appeals for the District of Columbia affirmed the suppression of wiretap evidence because the Government had failed to inform the authorizing judge of an earlier wiretap involving one of the named subjects. The Bellosi case, however, is radically different from the instant case in that the Government there had purposely

and intentionally failed to inform the authorizing judge of the prior tap. United States v. Bellosi, supra, 501 F.2d at 834, 835. In contrast, the Government's failure in this case was, at worst, attributable to the frailty of human memory. Unlike the situation in Bellosi, the Government here notified the Court that Michael O'Brien had been intercepted during the course of a previous federal wiretap.^{7/} There was clearly nothing to be gained, again in contrast to Bellosi, by not informing the District Court of all prior applications of which there was knowledge. In fact, Agent Santacroce testified that he would have included the information if he had been aware of it (Vol. V, pp. 712-713), and that he had no motive to conceal the information (Vol. IV, pp. 514-515). Judge Clarie found that Agent Santacroce, in his affidavit and in chambers testimony, "was fully aware of his statutory obligation to disclose to the Court all known previous applications and . . . was making a good faith effort to do so." (Ruling on Motion to Suppress, App., p. 103).

Although the Appellants make a point of stressing that Agent Ludwig and Lt. Sullivan, who both assisted Agent Santacroce in the investigation, also had some knowledge of the 1972 wiretap, Judge Clarie apparently did not consider it a significant issue.

^{7/} The Government was under no statutory duty to report this fact to Judge Clarie. See, United States v. Bellosi, supra, 501 F.2d at 839; United States v. Chiarizio, 388 F.Supp. 858, 874 (D. Conn. 1974), aff'd, 525 F.2d 289 (2d Cir. 1975).

He focused his attention on what Agent Santacroce, the author of the affidavit, knew and did. This was the correct approach because, whatever information Lt. Sullivan and Agent Ludwig had, it was not imparted to Agent Santacroce,^{8/} and Agent Santacroce himself had information which, had he recalled it, would have enabled him to make further inquiry to ascertain the fact of the 1972 State tap.^{9/} Judge Clarie accepted Agent Santacroce's testimony that he had simply forgotten about the interview by the time he prepared his affidavit:

"The Court finds that Agent Santacroce's testimony was open, truthful, and made with a good faith belief that the prior wire interceptions revealed in his affidavit were the only ones of which he was aware The Court finds that under all the circumstances there was no knowing or reckless misstatement made to the Court by him and that he had made a good faith compliance with the provisions of 18 U.S.C. §2518(1)(e). (Ruling on Suppression Motion, App., pp. 106-107).

^{8/} Lt. Sullivan concluded in December of 1972 that there had been a State wiretap (Vol. IV, p. 428), but he never told Agent Santacroce about it (Vol. IV, pp. 432-433; Vol. V, pp. 682-683). He was not aware that the federal statute required disclosure of all previous applications (Vol. V, p. 683). Agent Ludwig clipped a newspaper article concerning the arrest of O'Brien and others as a result of a wiretap and sent it to the New Haven FBI Office (Vol. VI, p. 799). He did not recall ever discussing it with Agent Santacroce (Vol. VI, p. 803). He was present with Agent Santacroce during the 1973 interview of O'Brien (Vol. IV, p. 804). The tenor of his testimony was that neither of these incidents came to his mind in December of 1974. Since Agent Santacroce was not aware of Lt. Sullivan's knowledge or of the clipping, we do not believe such knowledge should be imputed to him. See, United States v. Sapere, 531 F.2d 63, 67 (2d Cir. 1976) (knowledge of information by one agent cannot be imputed to other agents where there has been no communication of the knowledge).

^{9/} Agent Santacroce had interviewed O'Brien in 1973 and O'Brien had mentioned the State wiretap.

The Appellants, nevertheless, argue that compliance with the dictates of Section 2518(1)(e) is required to be so strict that there can be no justification for non-compliance. The Supreme Court, however, has taken a different view of analogous sections of the statute in a case closely on point. In United States v. Donovan, 429 U.S. 413 (1977), the Court addressed itself to the interpretation of two sections of the statute: Section 2518(1)(b)(iv), which requires the identification of persons likely to be overheard engaging in incriminating conversations, and Section 2518(8)(d), the "notice" requirement. Section 2518(1)(b)(iv) and Section 2518(1)(e), the subsection in question here, are interrelated parts of that portion of the statute which sets forth the criteria necessary to a proper application for an electronic surveillance order. The Court found that while the identification requirement was "undoubtedly important", United States v. Donovan, supra, 429 U.S., at 434, the failure to identify two individuals who could reasonably have been expected to have been intercepted was not a "failure to comply fully . . . [that would render] unlawful an intercept order that in all other respects satisfies the statutory requirements". Id. The Court clearly suggested that the question of whether or not the failure was intentional would be an important factor to be weighed in a determination of substantial compliance when, in a footnote, it stated:

"There is no suggestion in this case that the Government agents knowingly failed to identify

respondants . . . for the purpose of keeping relevant information from the District Court that might have prompted the Court to conclude that probable cause was lacking. If such a showing had been made, we would have a different case." United States v. Donovan, supra, 429 U.S. at 436, fn. 23.^{10/}

It is also important to note that here, as in Donovan, the affidavit provided sufficient information to satisfy the statutory preconditions that the Supreme Court saw as being central to the authorization process.^{11/} Also, although admittedly after the fact, Judge Clarie found that the information "would in all probability have provided supplemental reasons for granting [the order]." (Ruling on Motion to Suppress, App., p. 108).

In United States v. Abramson, 553 F.2d 1164 (8th Cir.), cert. denied, 501 U.S. 397 (1977), decided after Donovan, the Court was

^{10/} The question of "good faith" also was a part of the Court's determination in the inventory aspect of the case. In another footnote, the Court stated:

"Counsel for respondents . . . conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional . . . and we are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties." United States v. Donovan, 429 U.S. at 439, fn. 26.

^{11/} The Court saw the "statutorily imposed preconditions" as being those set forth in Section 2518(3)(a)-(d). United States v. Donovan, supra, 429 U.S. at 435-436. Obviously proper authorization by the Attorney General or a designated Assistant Attorney General, as required by 18 U.S.C. §2516, is also another critical factor. See, United States v. Giordano, 416 U.S. 505 (1974).

faced with a situation in which an affidavit had contained information about a 1970 wiretap in which two of the suspects had been intercepted, but did not state that the wiretap had been suppressed. The Court found that the omission constituted non-compliance with Section 2518(1)(e). United States v. Abramson, Id., at 1169. The Court then discussed whether suppression was necessary in light of an analysis of Donovan. They held:

"[T]he failure to disclose the fact of suppression of the 1970 wiretap did not detract from the sufficiency of the enumerated factors necessary to a judge's wiretap authorization and hence was not central or functional in guarding against unwarranted use of wiretapping or electronic surveillance." United States v. Abramson, supra, 553 F.2d at 1170.

In sum, it is the Government's position that there was substantial compliance with the mandate of Section 2518(1)(e), in that sufficient information was present to enable the District Court to determine that the statutory preconditions were satisfied and that the information would not likely have effected the Court's decision making process. The Appellants do not dispute the fact that the omission was unintentional and was the result of a failure of memory. In Michigan v. Tucker, 417 U.S. 433 (1974), the Supreme Court expressed sentiment that, we believe, is pertinent here. The Court stated:

"Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature make such an expectation unrealistic. Id., at 446.

The Appellants, on the other hand, attempt to rely on an overly rigid interpretation of the statute which completely ignores the Supreme Court's most closely related pronouncement on the subject of Title III. The decision of the District Court to deny suppression on this issue should therefore be upheld.

ARGUMENT III

THE UNITED STATES IS ENTITLED TO APPLY FOR, AND UTILIZE,
ORAL AND WIRE INTERCEPTIONS IN CASES WHERE PROBABLE
CAUSE EXISTS AND THE AUTHORIZING COURT FINDS THE
SITUATION APPROPRIATE FOR DUAL INTERCEPTIONS

The defendants argue that the Government must apply separately for oral and wire interceptions, and that suppression is mandated by a failure to do so. They base this somewhat unique argument on the use of the word "or" in the statute, and on an assumption that an oral interception is a greater intrusion than a wire interception. No known case supports this proposition. Title III in general, and Section 2518 in particular, make no distinction between the two methods: the application requirements are the same; the elements of the order are the same; the requirement of probable cause is the same; the time requirements are the same; the inventory provision is the same, etc. Taking their logic to its natural conclusion, the appellants' objection could be satisfied if the Government came before the Court with one affidavit, but two applications. Or the Government could make application for a wire interception, leave the Court's Chambers, and immediately return with the second application. This would obviously be absurd and unnecessary.^{12/} The defendants miss the point that it is the

^{12/} Section 1955(b)(1)(iii) of Title 18, United States Code, states that the Government must prove that the gambling business "has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of \$2,000 in any single day", yet it cannot be said that the Government cannot, if it chooses, prove both.

judge, to whom an application is made, that is the focal point of the statute. It is he who must determine whether the Government has shown probable cause, and who must determine whether a showing has been made which justifies the use of both techniques. We submit that this case, a gambling business conducted by phone, and in person, on premises where no legitimate business activity takes place, is precisely the type of situation where both techniques could reasonably be authorized.^{13/} Indeed, the District Court, in its Ruling on the Motion to Suppress, stated the following:

"[W]ith the target premises known to be using 'total telephone service', in which incoming calls were being transferred and re-transferred to unknown receivers, oral interception appeared essential to the accomplishment of an effective surveillance." (Ruling on Motion to Suppress, App., p. 100).

The Court found that the use of an oral device was justified and supported by probable cause, and the source of the evidence that the Government chose to present to the Grand Jury many months later has no bearing whatsoever on that decision. The United States therefore respectfully requests that Appellants' claim be denied.

^{13/} The informant information related by Agent Santacroce in his affidavit contained instances of gambling related conversations occurring on the premises in which the telephone was not utilized. (See, Supp. App., Dec. Aff., pp. 8,9,10,11 and 13). Moreover, the surveillances clearly proved a constant flow of persons in and out of the premises, most of whom were believed to be associated with the business. The Appellants nevertheless contend that no showing was made supporting the use of a "bug". The facts, as indicated, are otherwise.

ARGUMENT IV

TITLE III DOES NOT REQUIRE THAT THE ATTORNEY GENERAL
APPROVE THE MEANS USED IN IMPLEMENTING AN
ELECTRONIC SURVEILLANCE ORDER

The Appellants argue that the evidence in this case must be suppressed because the Attorney General did not authorize the December, 1974 surreptitious entries. The Government will not attempt to reiterate all of the arguments presented elsewhere in this brief on the issue of surreptitious entry. It is simply our position that the explicit approval by the Attorney General of surreptitious entries to implement Court-authorized electronic surveillance is not necessary, is not included in the statutory scheme of Title III, and that such a requirement ought not be "engrafted" on the statute. See, e.g., United States v. Kahn, 415 U.S. 143, 158 (1974).

Congress required that the Attorney General, or a specially designated Assistant Attorney General, authorize all applications for orders "authorizing or approving the interception of wire or oral communication". Title 18, United States Code, Section 2516 (emphasis added). Each application must identify "the officer authorizing the application". Title 18, United States Code, Section 2518(1)(a). The Supreme Court has stated that the purpose of these provisions was:

" . . . to condition the use of intercept procedures upon the judgment of a senior official in the Department of Justice that the situation is one

of those warranting their use." United States v. Giordano, 416 U.S. 505, 527 (1974) (emphasis added).

No mention is made in the statute, in United States v. Giordano, Id., or any case dealing with surreptitious entry to implement a Title III order, of a requirement that the Attorney General approve the means by which a Court's Order is implemented. While there are only oblique references in the legislative history to the question of implementing an oral interception, see, 114 Cong. Rec. 11598 (1968) (remarks of Senator Morse) and 12989 (1968) (remarks of Senator Tydings), the very fact that Congress included oral interceptions in the statute indicates an awareness of the implementation question. The logic of this proposition is that:

"[T]he installation of a transmitting 'bug' in private premises as a necessary condition precedent to the search and seizure of the subsequent oral communications must, in the very nature of things, be preceded by a covert entry of some kind." United States v. Ford, 414 F.Supp. 879, 882 (D.C.D.C. 1976), aff'd, 553 F.2d 146 (D.C. Cir. 1977).

Congress could have, but did not, charge the Attorney General with this responsibility. Instead this unstated responsibility devolves upon the authorizing Judge, as is the case with so many other aspects of the statutory scheme. See, e.g., Title 18, United States Code, Sections 2518(2), (3), (4), (5), and (6). Despite the defendants' posturing about "pointing fingers" and "political embarrassment", which is both offensive and totally speculative, the Congressional purpose of making the Attorney

General or his designated Assistant Attorney General responsible for each and every wiretap has been fully satisfied in this case.

The fact that the Government, in an excess of caution, and attempting to forestall further complications concerning the knowledge of the official authorizing the application (See, Vol. I, January 10, 1975, In Chambers Proceeding, pp. 2-12), provided the Court with a letter from the Assistant Attorney General, Wallace H. Johnson, concerning surreptitious entry to implement the electronic surveillance, does not make such action a necessary prerequisite to judicial authorization of electronic surveillance. The letter simply states the official position of the Department of Justice that the Attorney General's approval of the use of electronic surveillance necessarily carries with it the approval of all reasonable implementation methods, and that it was to the Court that Congress gave the authorizing power.^{14/}

The United States, therefore, respectfully suggests that Appellants' contention is without merit and ought to be rejected.

^{14/} The defendants' contention that the Government "cleverly" chose the wording of this letter suggests a deviousness which is totally unsupported by the record.

ARGUMENT V

THE DISTRICT COURT CORRECTLY DENIED SUPPRESSION OF THE
ELECTRONIC SURVEILLANCE BECAUSE THE ORDER IMPLICITLY
AUTHORIZED COVERT ENTRY INTO 103 NEW BRITAIN AVENUE,
BECAUSE THE OTHER ENTRIES WERE NECESSARY,
REASONABLE, AND MADE IN GOOD FAITH, AND
BECAUSE THE APPELLANTS LACKED THE
REQUISITE STANDING TO OBJECT
TO THE ENTRIES

FACTS RELEVANT TO THE ENTRY ISSUES

On December 16, 1974, the United States made application to the United States District Court for the District of Connecticut (Clarie, Chief Judge) for an Order authorizing the interception of wire and oral communications from the premises of 103 New Britain Avenue, Hartford, Connecticut. The application was authorized by the Attorney General of the United States, William B. Saxbe, and relied for probable cause upon an affidavit prepared and sworn to by Special Agent Dewey L. Santacroce of the Federal Bureau of Investigation. The affidavit of Agent Santacroce, whom Judge Clarie described as "an experienced and reliable investigator" in his Ruling on the Motion to Suppress (App., p. 75), contained all the information required by Section 2518(1)(a-d).^{15/} In general the affidavit described a three-month investigation into an alleged gambling business being conducted by Michael O'Brien and other named individuals out of a store-front located at 103 New Britain Avenue in Hartford. Certain aspects of the affidavit and in chambers testimony are particularly germane to

^{15/} The Appellants challenge two aspects of the affidavit: the section on "other investigative means" and the section concerning "previous applications". Judge Clarie, however, found that the application and affidavit complied with the statute. The Appellants, with the above-stated exceptions, do not challenge his finding of probable cause.

the arguments that will follow.^{16/}

The affidavit described 103 New Britain Avenue as being located on the first floor of a three-story apartment building in approximately the center of the structure (Supp. App., Dec. Aff., pp. 33-34). A sign over the door bore the legend "Insurance-Real Estate, Protect What You Have" (Supp. App., Dec. Aff., p. 34).^{17/} A diagram of the interior of the office was provided to the Court and Agent Santacroce orally gave additional information concerning the interior (In Chambers Proceeding, Dec. 16, 1974 (hereinafter referred to as Dec. 16), Supp. App., p. 61). The Court was informed that no legitimate business activity occurred on the premises (Dec. 16, Supp. App., pp. 57-58). In the Ruling on the Motions to Suppress, the District Court stated the following on this point:

"From the known facts, this supposed business premises was not a residence; nor was it a place where any business of a legitimate nature was being conducted . . . In particular, the location was not a place for the sale of insurance or real estate. The office was unquestionably a sham and a 'criminal blind' designed and maintained solely for the conduct of criminal activities." Ruling on Motions to Suppress, App., p. 76.

During the course of the in chambers proceeding on December 16, 1974, the following discussion took place between the Court and

^{16/} The entire affidavit can be found in the Government's Supplemental Appendix.

^{17/} The telephone was listed to the O'Brien-Sullivan Home Improvement Company (Supp. App., Dec. Aff., p. 2).

one of the Government attorneys:

"THE COURT: So that the record will disclose what you mean by 'oral interception' -- we read cases about one using a detector, on the outside of a public telephone booth, or etcetera -- what type of oral interception is proposed by the Government, if you know?

MR. COFFEY: Your Honor, it would be a device which would allow for the monitoring and recording of the conversations taking place within the four walls of the room that we know as O'Brien-Sullivan Home Improvement Corporation.

The actual technical device to be used has yet to be determined, because of course there has been no entry by the Government on the premises. So the feasible means is not known yet.

THE COURT: In other words, so that it will be clear, what you would do is to place a microphone broadcasting unit, the contents of which could be picked up within the immediate area on a recorder, that would record whatever conversation was relevant within the particular room or address, at that address?

MR. COFFEY: Basically, Your Honor, the recorder probably would be here in the Federal Building. It would be some type of system whereby the microphone would relay the conversations to a mutual recording place." Dec. 16, Supp. App., pp. 57-58.

After discussing the steps that would be taken towards minimization, including specific reference to the problem of minimization of the oral device (Dec. 16, Supp. App., pp. 65-74), and the schedule of progress reports by the Government (Dec. 16, Supp. App., pp. 73-74), the Court signed the Interception Order (Dec. 16, Supp. App., p. 75).

Also on December 16, Special Agent Robert Puckett, who was responsible for the mechanical implementation of the electronic

surveillance, was informed by John O'Connor, a security officer for the Southern New England Telephone Company, that the line for the telephone on the premises of 103 New Britain Avenue appeared in a terminal box in the basement of the building housing that premises (Vol. V, p. 574). The following day Puckett learned that the telephone line also appeared on a telephone pole on the opposite side of New Britain Avenue (Vol. VI, p. 827). On this point the District Court made the following finding:

"On December 16, 1974, the day before the events just described, the telephone company advised Agent Puckett that the telephone line 203-247-6309, had its 'binding-post appearances' in the basement of the building in which 103 New Britain Avenue was located, (Tr. 574) and that no 'binding-post appearances' were available at any other location which were not already in full use. The agent relied on the information given to him by an experienced and authorized telephone company representative, who stated that engineering problems made the use of a binding-post appearance on a nearby outdoor telephone pole in the area to be infeasible. (Tr. 821-822, 830-832, 834-835, 840)". Ruling on Motion to Suppress, App., p. 79.

During the early morning of December 17, F.B.I. agents made a key to the door of 103 New Britain Avenue and entered to conduct a preliminary survey to determine how a listening device could be utilized (Vol. IV, pp. 299-300). The agents then attempted to make an impression for the lock on the rear door to the common basement of the apartment building (Vol. IV, p. 301). No entry was ever made through this door (Vol. IV, pp. 301-302). The agents also entered through the unlocked front doors on the

side of the building known as 11 Julius Street (Vol. IV, p. 302). They inspected the lock on a door, at the end of the vestibule, which led to the basement of the building (Vol. IV, pp. 302-303). No entry was made into the basement on this occasion (Vol. IV, p. 302).

During the early morning hours of December 18, 1974, Agent Puckett entered 103 New Britain Avenue and installed an electronic listening device in the floor next to a radiator (Vol. IV, p. 240). The wires from the device were run next to a water pipe into the basement (Vol. IV, p. 240).^{18/} At the same time, two other agents entered the basement by using a skeleton key in the inner basement door at 11 Julius Street (Tr., Vol. IV, p. 307). An agent unlocked a chicken wire barrier that separated the area underneath 103 New Britain Avenue from the telephone box which Agent Puckett believed contained the appearances for the telephone (Vol. IV, pp. 245, 308), and the lines for the oral device (Vol. VI, pp. 822-823). Agent Puckett entered the basement

^{18/} In this regard it is important to note that the listening device needed "dry" wires to operate (Judge Clarie describes the technical process in the Ruling on the Motions to Suppress, App., p. 98), and, as found by the District Court, the only hook-up point available was the terminal box in the basement, which also housed the binding-posts for the subject telephone (Ruling on Motion to Suppress, App., pp. 79, 98-100; see also, Vol. VI, pp. 822-824).

through 11 Julius Street (Vol. IV, p. 241), retrieved the microphone wire (Vol. IV, pp. 244-245), and made connections for the oral and wire interceptions in the telephone box (Vol. IV, p. 245). He was unable, however, to get the equipment to function (Vol. IV, pp. 247-248).

Agent Puckett and Agent Richard D. Ludwig entered the basement again on the night of December 18, 1974 (Vol. IV, p. 248), for the purpose of trying to determine why the equipment would not function (Vol. IV, p. 249). This attempt was also unsuccessful (Vol. IV, p. 249). Agent Puckett did, however, notice other telephone wires running into an enclosed, locked area of the basement which was under John's Delicatessen at 99 New Britain Avenue (Vol. IV, p. 250). The problems were reported to Agent Santacroce (Vol. IV, p. 254).

On December 19, 1974, at an in chambers proceeding which began at 10:10 a.m., the Government reported its problems to the Court. Agent Santacroce informed the Court that the telephone line appeared in a second terminal box inside an enclosed area of the basement under John's Delicatessen (In Chambers Proceeding, December 19, 1974 - hereinafter referred to as Dec. 19 - App., pp. 243-244). The area was described as being enclosed by "a heavy timber and wire mesh screen". (Dec. 19, App., p. 244). Agent Santacroce indicated that the phone company was checking a possible alternative procedure, for the wiretap, involving a

pole (Dec. 19, App., p. 245). However, the alternative apparently would not be feasible for the oral device since he went on to state:

"And in addition, they would have to run a base line to the box, which is roughly on the premises underneath 11 Julia [sic] Street, where our microphone would be, would come out." Dec. 19, App., p. 245.

The Court found that Agent Santacroce also explained the need to use 11 Julius Street as a means of access to the basement. Ruling on Motions to Suppress, App., p. 98. The Government proposed a nighttime entry into John's Delicatessen in order to implement the Court's Order of the 16th. (Dec. 19, App., pp. 246-248). The Court, however, rejected this proposal, because of the possibility of tragedy which could come from covertly entering a business establishment, and suggested that a less dangerous method be found (Dec. 19, App., pp. 249-252; see also, Ruling on Motions to Suppress, App., p. 112).

The Court's concern was conveyed to the telephone company, which proposed sending a repairman into the Delicatessen during business hours and transferring the service to the other telephone box in the basement (Vol. V, p. 608). All other alternatives had been eliminated by this time (Vol. V, pp. 569, 579-580, 590, 608, 610, 626).

At approximately 2:00 p.m. that day, Agent Puckett entered John's Delicatessen in the company of a telephone repairman (Tr., Vol. IV, p. 255). Puckett was dressed in a suit and rain coat

(Vol. IV, p. 259). The repairman told the owner, "We would like to go to the telephone equipment in the basement." (Vol. IV, p. 350).

The owner gave them permission to enter the basement (Vol. IV, p. 257). Agent Puckett did not volunteer, and was not asked, that he was with the F.B.I. (Vol. IV, pp. 256-257). While in the basement, the owner opened a wire mesh door to give Agent Puckett and the repairman access to the other telephone box in the basement (Vol. IV, p. 258-259). Three pairs of wires were then run from the telephone box below 99 New Britain Avenue to the telephone box in the common basement (Vol. IV, p. 260). The agent and repairman then exited through the Delicatessen (Vol. IV, p. 260). Agent Puckett and Ludwig returned to 11 Julius Street that night and made the appropriate connections for the wire and oral interceptions (Vol. IV, p. 261). No further entry was ever made into the Delicatessen subsequent to this occasion (Vol. IV, p. 264). The basement was again entered that night to make the final connection (Vol. IV, p. 261).

On December 20, 1974, the Court was informed that the wiretap had become operational at 9:30 p.m. on the 19th of December, but that the oral device was still not operable. (Vol. I, December 20, 1974 In Chambers Proceeding, p. 2). That night Agent Puckett returned to the basement to replace the wires to the oral device that were in the terminal box (Vol. VI, pp. 264-265). The agents again returned on December 30, 1974 to disconnect the equipment (Vol. IV, pp. 266-267).

On January 10, 1974, the government applied for a new interception order to renew the wire and oral interceptions. The Court decided that the moving papers should make reference to 11 Julius Street as a precaution and the hearing was postponed. (Vol. I, January 10, 1975, In Chambers Proceeding, p. 35). The Court signed a new Order, which included reference to 11 Julius Street, on January 16, 1975. That same day Agent Puckett entered the basement and made the necessary reconnections (Vol. IV, pp. 269-270). A final entry of the basement was made the night of January 29 for the purpose of retrieving the microphone and disconnecting all equipment. No entries were made in January into 103 New Britain Avenue.

The District Court, in Ruling on the Motions to Suppress, made the following critical finding:

1. that the execution of the Court's orders were reasonable and lawful (Ruling on Motions to Suppress, App., p. 73), and;
2. that both oral and wire interceptions were necessary (Ruling on Motions to Suppress, App., pp. 76, 100); and
3. that no legitimate business activity was occurring at 103 New Britain Avenue (Ruling on Motions to Suppress, App., pp. 5, 18);
4. that the Court was aware that it was authorizing covert entry to implement oral interception (Ruling on Motions to Suppress, App., p. 77, 87, 110);

5. that to the agents' knowledge the only place available to make the necessary connections for the oral and wire interceptions was in a terminal box in the basement of the building (Ruling on Motions to Suppress, App., pp. 8, 98-99);

6. that the daytime entry into the Delicatessen did not violate any order of the Court (Ruling on Motions to Suppress, App., p 113);

7. that the Court was aware, by December 19, 1974, of the necessity of entry into the basement through 11 Julius Street (Ruling on Motions to Suppress, App., p. 95);

8. that none of the defendants had the requisite standing to object to the basement entries (Ruling on Motions to Suppress, App., pp. 95-96).

A VALID ELECTRONIC SURVEILLANCE ORDER IMPLICITLY
AUTHORIZES REASONABLE ACTIONS NECESSARY
FOR IMPLEMENTATION

The Appellants contend that Title III does not expressly or implicitly empower a District Court to authorize surreptitious entry to implement electronic surveillance. The Courts that have dealt with this issue, however, are unanimous in holding "that Congress did intend to empower courts to permit such entries in proper cases and under proper procedures". United States v. Scafidi, 564 F.2d 633 (1977), cert. denied sub nom; Vigorito v. United States, Napoli v. United States, and DeLuca v. United States, 23 CrL 4057 (May 17, 1978); see also, United States v.

Ford, 553 F.2d 146 (D.C.Cir. 1977); United States v. Agrusa 541 F.2d 690 (8th Cir. 1976), cert. denied, 429 U.S. 1045; In Re Application of United States, 563 F.2d 637 (1977); United States v. Finazzo, 429 F.Supp. 803 (E.D.Mich. 1977); United States v. Dalia, 426 F.Supp. 682 (D.N.J. 1977); United States v. London, 424 F.Supp. 556 (D.Md. 1976), aff'd on other grounds, 556 F.2d 709 (4th Cir. 1977). The question then is not whether such authority existed, but, under the facts of this case, whether it was properly given and correctly exercised. In this regard, a survey of the primary cases dealing with this issue is appropriate.

The Eighth Circuit in United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977), was faced with a nighttime entry into a business premises to implant a listening device. The Court dealt with the issue primarily on Fourth Amendment grounds, and found that forcible entries into businesses or unoccupied premises are not entitled to the same degree of protection as occupied dwellings.

"What authority there is holds that unannounced and forcible entries into vacant premises, even homes, in order to conduct a search, are constitutional in the absence of exigent circumstances, provided that the search and seizure is pursuant to warrant and reasonable under the circumstances." United States v. Agrusa, supra, 541 F.2d at 697-698 (emphasis in original).

In Agrusa, the Government had requested and received separate authority to enter the premises. The Court, staying strictly

within the bounds of the facts of the case, did not deal with the question of whether separate authority was always necessary. They did not foreclose the possibility that a separate order might not be necessary, but simply stated that resolution of the question would be more difficult. United States v. Agrusa, supra, 541 F.2d at 696, n.13. The Court ended by stating:

"We hold that law enforcement officials may, pursuant to express court authorization to do so, forcibly and without knock or announcement, break and enter business premises which are vacant at the time of entry in order to install an electronic surveillance device, provided the surveillance activity is itself pursuant to court authorization, based on probable cause and otherwise in compliance with Title III." United States v. Agrusa, supra, 541 F.2d at 701 (emphasis added).

In United States v. Ford, 414 F.Supp. 879 (D.C.D.C. 1976), aff'd 553 F.2d 146 (D.C.Cir. 1977), law enforcement officers used a bomb scare ruse to implant electronic bugging devices in a business establishment. The Court authorizing the electronic surveillance was of the opinion that any pretext used to implement the Order was reasonable and left the exact method up to the police. United States v. Ford, 414 F.Supp, 879 at 881. Two entries were made, both being with the approval of the Court. The reviewing District Court found that Congress had impliedly granted courts the power to authorize surreptitious entries. United States v. Ford, supra, 414 F.Supp. at 883. The Court found that surreptitious entry was obviously "a necessary condition precedent to the search and seizure of . . . oral

communications", United States v. Ford, supra, 414 F.Supp at 882, and that:

" . . . there are no statutory provisions identifying the technique to be used for accomplishing such an installation nor are there any limitations placed by statute upon the type of ruse or technique that the police may or may not be employed." Id.

However, after finding that the "ruse" was reasonable, and that the Court had "carefully monitored the situation", supra, at 883, the Court inexplicably ordered the evidence suppressed because:

"The authorization . . . did not limit the number of entries nor did it specify either the general time or manner of entry." United States v. Ford, supra, 414 F.Supp. at 884.^{19/}

The Court of Appeals for the District of Columbia upheld the suppression, holding that a separate warrant of entry provision must be obtained, which specifies details such as time and method of entry, that a separate showing of probable cause in support of the entry warrant is required,^{20/} and that this procedure must be

^{19/} The Court's decision that the order was impermissibly overbroad was largely based on the fact that there was no record of the authorizing Judge's knowledge of how the Order was to be implemented.

^{20/} Interestingly the Court found that the probable cause sufficient to warrant the seizure of conversations, was not sufficient to support the entry provision which authorized entry to install, maintain and remove the devices. United States v. Ford, supra, 353 F.2d at 169. The Fourth Circuit, while requiring separate entry authority, approved precisely the same language rejected in Ford. See, In Re Application of the United States, 563 F.2d 637, 645 (4th Cir. 1977).

followed for every entry that is contemplated. United States v. Ford, 553 F.2d 146, 152-169 (D.C.Cir. 1977). One commentator, in analyzing the Ford decisions, has stated:

"The Court of Appeals' holding ignores both the practical realities of surreptitious entry as well as the legal precedent relating to multiple interceptions. The technical problems of any covert entry, with the innumerable variables and unforeseeable contingencies, preclude any specificity if the entry team is to have the necessary flexibility to adapt to unpredictable conditions . . . While some entries may be susceptible to formal antecedent judicial approval, as a general rule entries involve an on-the-spot decision made after a careful and cautious analysis of the then existing situation by a highly trained professional

To require specific formal approval for each covert entry as to time and method not only ignores the problems of the entry itself, but also imposes a legal stricture on those entries which is greater than that which circumscribes the actual oral interceptions themselves. Electronic surveillance by its very nature encompasses the interception of numerous conversations in order to acquire the evidence sought. Neither Berger [388 U.S. 64 (1967)] nor Title III require that a separate probable cause determination be made for each interception. This was discussed in United States v. Cox [462 F.2d 1293 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974)], where it was raised as a challenge to the constitutionality of Title III, and was rejected. The probable cause showing and finding of the need for the interception satisfies the Berger requirements so that a wiretap or bug can be used for a period of time to intercept multiple conversations of multiple individuals if warranted by the facts of the case. The items to be searched for and seized are the conversations, and if each search and seizure need not be prefaced by a formal probable cause showing, then a fortiori the entry to effect such searches and seizures, which is far less intrusive and less violative of the privacy of the person, does not require a higher standard to be met before entry is allowed." McNamara, The Problem of Surreptitious Entry to Effectuate Electronic Eavesdrops: How Do You Proceed After the Court Says "Yes"?, 15 Amer. Crim. L. Rev. 1, 14-18 (1977).

In sharp contrast with Ford, is this Court's decision in United States v. Scafidi, 564 F.2d 633 (2d Cir. 1977), cert. denied, U.S. , 23 CrL 4057 (May 17, 1978). The fact situation was that covert entries had been made into an apartment, to implant a listening device and then reposition it, and into a Lounge, once to install, once to reposition, and once to restore batteries.^{21/} United States v. Scafidi, supra, 564 F.2d at 637-638. All the electronic surveillances had been authorized by Judges of the Eastern District of New York, but none of the orders included authority for the covert entries or delimited the manner in which the entries were to be accomplished. United States v. Scafidi, supra, 564 F.2d at 639. The various defendants moved for suppression on the ground that the entries were unauthorized and illegal. Chief Judge Mishler denied suppression holding that:

"[O]nce probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the Court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment." United States v. Scafidi, supra, 546 F.2d at 640.

This Court agreed, and expanded on the theme by stating:

"Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that

^{21/} On another occasion, agents entered to restore batteries, but on that occasion an entry order was obtained. Id., at 638.

it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out

It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning." United States v. Scafidi, supra, 564 F.2d at 640.

The Court also stated that the initial authorization carried over to subsequent entries directly related to the original purpose. Id.

ENTRIES INTO 103 NEW BRITAIN AVENUE

The two entries into 103 New Britain Avenue fall squarely within the rationale expressed in Scafidi. Here Judge Clarie gave close scrutiny to the elements required by the statute (18 U.S.C. §2518), including satisfying himself that probable cause existed, indeed the Appellants do not challenge the sufficiency of the probable cause, and that other investigatory means would not suffice. The parties, facilities, and types of conversations were specified. In addition, the premises, ostensibly a business location, was found to be a "criminal blind" (Ruling on Motions to Suppress, App., p. 76) where no business of a legitimate nature was conducted. The Court was aware that a covert entry would be necessary to implement the Court's Order (Ruling on Motions to Suppress, App., pp. 76, 87). The entries were made unobtrusively

and, we suggest, were reasonable in every respect. There is no suggestion, for example, that the agents "seized or attempted to seize or inspect papers or other articles not embraced in the order". United States v. Scafidi, supra, 564 F.2d at 640.

THE ENTRY INTO 99 NEW BRITAIN AVENUE

The need to enter the premises of John's Delicatessen arose when the agents realized, the night of December 18, 1974, that the information received from the telephone company concerning the appearance of the subject telephone was not accurate. The agents had been informed that the telephone line appeared in the basement under 101 New Britain Avenue, when in fact it appeared in a second terminal box, under the delicatessen, which the agents were unable to reach. The following morning (December 19, 1974), the Government returned to the Court, explained its problem, and sought separate authority to enter 99 New Britain Avenue after business hours in order to interconnect the two terminal boxes (Ruling on Motions to Suppress, App., p. 112; Dec. 19, App., pp. 241-253). The District Court, in expressing its concern over a surreptitious entry into an actual business premises, and subsequently denying the authority, was, we believe, setting parameters beyond which the agents could not go and directing that a more reasonable, safer solution be found. (See, Ruling on Motions to Suppress, App., p. 112). The final comments made during the conference, which are stressed heavily by the Appellants,

should not be interpreted as an order prohibiting the agents from taking any action without first informing the Court, but rather indicate that the Court was willing to reconsider the question of the nighttime entry if no other means were found (Dec. 19, App., pp. 252-253). The Government respected the Court's wishes by acting on the alternative offered by the telephone company of entering the Delicatessen, openly and in business hours, in the company of a telephone company representative. The action was obviously taken in good faith and reasonable belief that this method would satisfy the concerns expressed by the Court. The appellants' claim that this entry was made by "fraud and misrepresentation", but in fact Agent Puckett was dressed in a suit and rain coat (Vol. IV, p. 259), and the telephone company representative told the owner that: "We would like to go to the telephone equipment in the basement" (Vol. IV, p. 257). The owner gave his permission without further inquiry (Vol. IV, p. 257). Courts have frequently, in analogous situations, upheld entries by ruse. For example, in Ponce v. Craven, 409 F.2d 621 (9th Cir. 1969), police officers heard two people talking about heroin inside a motel room. They arranged for the manager to go to the door and announce that there was a telephone call for one of the persons. The door was opened, and the police walked in without announcing their purpose or identity. The Court stated:

"The employment of a ruse which results in the occupants of a dwelling voluntarily opening the door and thereby allowing officers to enter without announcement of their purpose, is not a breaking . . ."
Id. at 626 (emphasis added). See also, United States

v. Syler, 430 F.2d 68 (7th Cir. 1970) (agent identified himself as the "gas man" to gain entry); Smith v. United States, 357 F.2d 486 (5th Cir. 1968).

The District Court found that the entry had been made with the "tacit approval of the proprietor", and had not violated the Court's order (Ruling on Motions to Suppress, App., p. 113). The Court also found that none of the defendants had standing to object to the entry, a subject which will be more fully developed below. Although the reasoning of Scafidi is not totally applicable in this situation, since the warrant specified only 103 New Britain Avenue, it is clear that the entry was made for only one purpose - to implement the Court's Order. There was neither search or seizure, the agents conducted themselves reasonably, and there was no interference with the premises' business activities. The Court had been informed of the technical problem hindering implementation of the Order, and requested that a method be found that would be less subject to potential tragedy. The agents acted in good faith to accomplish their lawful purpose. The District Court found "that a valid public interest justified the intrusion and that probable cause was shown to exist". (Ruling on Motions to Suppress, App., p. 100). Under these circumstances, we believe that the District Court's finding that the entry was within the scope of the Court's Order be upheld.

As a corollary to their attack on the Delicatessen entry, the Appellants claim that the wiretap must be suppressed because

the Government, they imply, deliberately withheld information from the Court that Pole 2602 offered a reasonable alternative. They rely on an interpretation of facts at great variance to those found by the District Court after a four day suppression hearing. Many of their "facts" stem from the testimony of John O'Connor, an employee of the Southern New England Telephone Company, who Judge Clarie charitably stated "did vacillate" (Ruling on Motions to Suppress, App., p. 99; see also, fn. 6, p. 127), at the suppression hearing.

The facts show, however, that all other alternatives save the daytime entry had been eliminated prior to Agent Puckett and the repairman entering the Delicatesser. (Vol. V, pp. 569, 579-580, 590, 608, 610, 626). Agent Puckett testified that he was told by O'Connor that an engineering problem eliminated the use of the pole (Vol. VI, pp. 821-822, 830-832, 834, 835, 840; Ruling on Motions to Suppress, App., p. 79). One of the Government attorneys involved testified that prior to the 19th, the possibility of using the pole had been considered but, based on information supplied by the phone company, it was concluded that the pole could not be used (Vol. VI, p. 732). The Court was not advised that the pole could be used, because the Government had no information that it could be used. In rejecting this argument in the Ruling on the Motions to Suppress, the Court stated:

"The defendants' purely speculative hindsight argument - that the Court might have required the wiretap to be undertaken by engineering changes on pole #2602, had it been fully informed of the facts - is not credible. This proffered conclusion relies on the use of

information that was not available at the time of the decisionmaking in question. In addition, with the target premises known to be using 'total telephone service', in which incoming calls were being transferred and re-transferred to unknown receivers, oral interception appeared essential to the accomplishment of an effective surveillance. The Court finds from the special facts of this case that a valid public interest justified the intrusion [into 99 New Britain Avenue] and that probable cause was shown to exist." (Ruling on Motions to Suppress, App., p. 100).

We respectfully request that this finding be upheld.

THE ENTRIES INTO 11 JULIUS STREET

This subject, the 11 Julius Street entries, is by far, from the Government's view, the most critical area because if this Court finds that these entries mandate suppression of the wiretap evidence the entire case, of necessity, falls.

On December 16, 1974, the District Court authorized the use of both an oral device and a wiretap. As has been previously pointed out, the location against which the order was directed was part of an L-shaped, multi-storied building at the corner of New Britain Avenue and Julius Street in Hartford.^{22/} In order for the oral device to function, it had to be connected to a terminal box where telephone lease line service was available (See, Ruling on Motions to Suppress, App., pp. 98-99). The wiretap also needed to be connected at a point where the particular phone line appeared and a second lease line was available. (Ruling on Motions

^{22/} For a diagram of the building see, United States v. Volpe, 430 F.Supp. 931, 938 (D.Conn. 1977).

to Suppress, App., p. 79). The information provided by the telephone company on the 16th and 17th of December indicated that the only place where the necessary connections could be made was in the basement of the building (Ruling on Motions to Suppress, App., pp. 79, 9^o see also, Vol. V, pp. 559, 568-569, 579, 625-627; Vol. VI, pp. 820-824, 830-832, 834-834, 840-841). Thus, while in the basement for the purpose of connecting the oral device, they could also implement the wiretap aspect of the Order. Early on the 17th, agents entered 103 New Britain Avenue to determine how the oral device could be emplaced. There was only one door, and no access to the basement. The agents also inspected the two possible routes into the basement, but no entry was actually made. During the early morning hours of the 18th, an oral device was installed in the premises next to a radiator pipe. The wires from the device were run into the basement. At the same time agents had entered the basement, which was unoccupied. The wires from the oral device were run to a terminal box and connected, as was the wiretap. That evening another entry was made to determine why the devices were not functioning. The following day, at the hearing regarding the proposed entry into the Delicatessen, the Court was informed that agents had been in the basement and the microphone wires were already in place there (Dec. 19, App., pp. 243-244, 245, 249). The Court expressed no concern over this fact, but directed its attention specifically to the proposed entry of a business

establishment. An entry was also made that night to make connections, on the 20th to determine why the oral device was still not functioning, and to disconnect on December 30, 1974. Two entries were made in January, 1975, once to reactivate and once to terminate.

The Appellants characterize the agents as being "out of control", yet the entries were unobtrusive and did not interfere with the activities of any tenant. The entries were all made into an unoccupied portion of the building. No claim is made that the agents took any action not directly related to the accomplishment of their primary goal, the implementation of the District Court's Order. See, United States v. Scafidi, *supra*, 564 F.2d at 640; United States v. London, *supra*, 424 F.Supp. at 560. The Government obviously believed that the Court's Order carried with it the authority to take whatever reasonable steps were necessary to implement it. Of course, there is always a risk that subsequently the actions of the Government's agents may be found to have been excessive and unreasonable. That, of course, is the purpose of the exclusionary rule.^{23/} Keeping in

^{23/} The Supreme Court has stated:

"The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused. Where the official action was pursued in complete good faith, however, the deterrent rationale loses much of its force." Michigan v. Tucker, 417 U.S. 433, 447 (1974). (emphasis added).

Here, of course, the agents had already received the Order authorizing the interception of oral and wire communications.

mind the unique facts and circumstances of this case, the good faith actions of the agents ought not to cause the suppression of evidence gathered under a valid warrant. See, United States v. London, supra, 424 F.Supp. at 560 (dicta: unauthorized entry would not make evidence from authorized electronic surveillance inadmissible).

STANDING

The thrust of the Appellants' arguments are directed at the entries into the basement of the building housing 103 New Britain Avenue, and the overt entry into the Delicatessen. It is important to note, and the District Court, so found, that no showing has ever been made that any of the defendants/appellants possessed any proprietary rights or possessory interests in those areas (Ruling on Motions to Suppress, App., pp. 95-96). Nor can they claim any reasonable expectation of privacy as to those areas.

The main thrust of Section 2518 is toward the imposition of "important preconditions to obtaining any intercept authority". United States v. Giordano, 416 U.S. 505, 515 (1974).

"Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." United States v. Giordano, Id.

The critical aspects of the statute are:

(1) the prior, informed judgment of the Attorney General or a designated Assistant Attorney General, that the use of electronic surveillance is necessary (Sec. 2516);

(2) a finding of probable cause (Sec. 2518(3)(a), (b), and (d));

(3) a determination that other investigative procedures had failed or would fail (Sec. 2518(3)(a), (c)).

With the exception of the portion of the statute which deals with requests for cooperation orders (Section 2518(4)), the statute is silent as to the means by which an order is physically initiated.

The Appellants cannot claim automatic standing under the statute. Although Section 2510(11) defines an "aggrieved person" as "a person who was a party to an intercepted wire or oral communication or a person against whom the interception was directed", the analysis cannot stop there. Section 2518(10)(a) specifies the grounds upon which an aggrieved person may move for suppression. They are:

- " (i). the communication was unlawfully intercepted;
- (ii). the order of authorization is insufficient on its face; or
- (iii). the interception was not made in conformity with the order of authorization or approval."

Subsection (i) deals with unlawful interceptions. This encompasses constitutional as well as statutory violations. United States v. Giordano, supra, at 527; United States v. Donovan, 429 U.S. 413,

432, fn. 22 (1977)). The Constitutional violations would go to engaging in electronic surveillance without a Court order, lack of probable cause, United States v. Giordano, supra, at 526, failure to identify the particular phone line to be tapped and the particular conversation to be seized, United States v. Donovan, supra, 429 U.S. at 427, fn. 15, and proper notice and return, United States v. Donovan, supra, 429 U.S. at 429, fn. 19. As to statutory violations under §2518(10)(a)(i), the Supreme Court has stated:

"[W]e think Congress intended to require suppression where there is a failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for this extraordinary investigative device." United States v. Giordano, supra, 416 U.S. at 527 (1974) (emphasis added).

We suggest that the Order and interceptions complied with the pertinent constitutional and statutory requirements and that, therefore, the communications were not unlawfully intercepted.

Subsection (ii) addresses situations where the Order is insufficient on its face. It was intended, according to the Supreme Court, to reach purely statutory violations. United States v. Giordano, supra, 416 U.S. at 525, fn. 14, 526, 527; United States v. Donovan, supra, 429 U.S. at 432. As stated above, the statute does not deal at all with the implementation issue, and the Order was facially sufficient in that it contained all stated statutory requirements.

Finally, subsection (iii) deals with the interceptions conforming to the Order. It too deals with purely statutory transgressions involving the manner of conducting the interceptions themselves, United States v. Giordano, supra, 416 U.S. at 525, fn. 13. A prime example of this type of violation would be lack of minimization. See, e.g. United States v. Scott, 504 F.2d 194, 197 (D.C.Cir. 1974), aff'd, 23 CrL 3019 (May 15, 1978). In this case the interceptions did conform to the Order.^{24/}

The District Court found that the defendants lacked standing under Title III to challenge the basement and Delicatessen entries (Ruling on Motions to Suppress, App., p. 97). Chief Judge Mishler in the proceedings which led up to Scafidi, denied standing to most of the parties even though they claimed standing under the statute. This Court too, while it ultimately did not reach the issue, stated:

"[The] statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized 'interest', either possessory or proprietary, in the premises, can claim the required 'expectation of privacy' needed to object to such illegal entries." United States v. Scafidi, supra, 564 F.2d at 638.

^{24/} Judge Joseph Blumenfeld ruled on the minimization question in another case in which suppression of the fruits of this electronic surveillance were in issue. He found that the interceptions had been properly minimized (Ruling on Motions to Suppress, App., p. 124). On other matters, frequent reports were made to the Court, as ordered, and the interceptions terminated at the time directed by the Order.

Although the Court went on to intimate that it seemed "artificial" to deny standing to a person whose conversations would not have been overheard but for the entry, United States v. Scafidi, supra, 564 F.2d at 639, it is a standard, long accepted concept in traditional Fourth Amendment law. See, Alderman v. United States, 394 U.S. 165 (1969). The concept was reaffirmed by this Court, in a non-Title III context, very recently in United States v. Riquelmy, Docket No. 77-1385, Slip. Op. at 2047-2057 (2d Cir. March 16, 1978), wherein the Court stated:

"As a general rule fourth amendment rights may not be asserted vicariously . . . and 'suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence' . . . A party seeking to suppress evidence on fourth amendment grounds must ordinarily demonstrate that the evidence was seized as a result of an unlawful invasion of his own legitimate expectation of privacy in the place searched or in his person, papers, or effects . . . Usually he establishes standing by showing that he owned or possessed the property alleged to have been illegally seized or had a substantial interest in premises unlawfully searched." Id., at 2051-2052 (citations omitted); see also, Wong Sun v. United States, 371 U.S. 471, 492 (1963); United States v. Capra, 501 F.2d 267 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975).

Moreover, Congress specifically intended Title III to stay within the parameters of existing search and seizure law. United States v. Giordano, supra, 416 U.S. at 528, fn. 17. We suggest that, in a case such as this, where the Appellants, operating out of a criminal "blind", have no possessory interest or expectation of privacy in the premises entered; where one of the entries was into

an unoccupied portion of the building and the other was made with the tacit, if uninformed, approval of the proprietor, and where the agents acted reasonably in a good effort to implement an Order of the District Court, the entries should not invalidate the evidentiary fruits of a valid warrant, and we respectfully request that the District Court's denial of suppression on these grounds be affirmed.

ARGUMENT VI

TITLE III CONTAINS NO REQUIREMENT OF
PRE-INTERCEPTION NOTICE TO LANDLORDS

The Appellants argue that the Government was required under Title III to give pre-interception notice to Paul Mozzacoto (the owner of the premises which included 103 New Britain Avenue) and/or the owner of John's Delicatessen. In the alternative, the defendants argue that a showing to the District Court that such notice would have jeopardized the investigation was also required under Title III.

The portion of the statute that is in question, Section 2518(4) of Title 18, United States Code, provides in relevant part that the interception Order, "upon request of the applicant" (emphasis added), shall direct a landlord or other person to assist the applicant in the implementation of the authorized interception. The phrase "upon request of the applicant" is neither ambiguous nor superfluous. The plain meaning of the statute is that the Government may request, through the Court, authorization for any technical, unusual, or necessary assistance from uninvolved third parties if the applicant believes the situation so warrants. The Appellants make no claim that this subsection is ambiguous and thus, not surprisingly, cite no cases suggesting that the statute should be given an interpretation at odds with its express language. It is important to note that while this portion of the

statute is permissive in nature, other, more critical, aspects of the statutory scheme are mandatory in nature. For example, Section 2518(1)(a)-(f) dictates specifically what information a legally sufficient application must contain; Section 2518(3)(a)-(d) specifies what finding must be made by the Court to justify the use of electronic surveillance; and Section 2518(4)(a)-(e) specifies exactly what elements a legally sufficient Order must contain. Had Congress meant this portion of the statute to be mandatory, it would not have chosen the language that it did. There is simply no justification asserted or established for engrafting a new notice requirement to the already extensive list of technical procedural steps which are sine qua non to the authorization of electronic surveillance.

Agent Santacrose had sound reasons for not seeking, with the exception of the Southern New England Telephone Company, the assistance of third parties, particularly the landlord and the owner of the delicatessen a few doors from the headquarters of the gambling business (See, Vol. III, pp. 195, 197). While hindsight shows, in this case, that explicitly informing the District Court of these reasons would have saved future controversy, the very fact that it was made clear to the Court that surreptitious entries were required, along with other information

contained in the affidavit,^{25/} strongly implies that third party assistance was not believed feasible.^{26/} In any event, the Appellants make no claim that Agent Santacroce deliberately withheld his reasons for not seeking the landlord's cooperation, and since, as found by Judge Clarie, requesting a "cooperation" order is "purely discretionary" and is not a prerequisite to the granting of electronic surveillance authority (Ruling on Motion to Suppress, App., p. 20), the rationale of United States v. Donovan, 429 U.S. 413 (1977), that suppression is not justified in this type of situation, must be followed. We therefore respectfully urge that the District Court's denial of suppression on this ground be upheld.

^{25/} The affidavit points out that although 103 New Britain Avenue purported to be an Insurance Agency, no legitimate business activities occurred on the premises (Supp. App., Dec. Aff., p. 9). A constant flow of traffic in and out of the premises was documented, and during the October 11 and November 6 and 7, 1974 surveillances, individuals believed to be associated with the activities of 103 New Britain Avenue were exiting the premises and entering the delicatessen (Supp. App., Dec. Aff., pp. 24, 29). Both premises were housed in the same building (Supp. App., Dec. Aff., p. 34).

^{26/} It is, we suggest, unlikely that surreptitious entries, with all the attendant serious problems and potential legal ramifications that are inherent to the method, would have been voluntarily chosen if simpler methods had been available.

ARGUMENT VII

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN
DENYING APPELLANTS' MOTION THAT IT DISQUALIFY
ITSELF FROM HEARING AND DECIDING THEIR
MOTION TO SUPPRESS

The Appellants argue that Judge Clarie should have disqualified himself prior to the hearing on the motions to suppress. They base this claim not upon Sections 144 and 455 of Title 28, United States Code,^{27/} statutes which specifically deal with the question of recusal, but rather their claim rests upon their allegation that Judge Clarie was "in a position of hearing evidence and argument to justify conduct that ignored his expressed

^{27/} Section 144 mandates disqualification where a party files "a timely and sufficient affidavit that the judge . . . has a personal bias or prejudice against him or in favor of any adverse party . . ."

Section 455 states, in pertinent part:

"(a) Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned .

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . . "

Under either statute "bias" must have an extrajudicial source. See, United States v. Wolfson, 558 F.2d 59, 62 (2d Cir. 1977).

concerns" (Appellants' Brief, p. 63) over the implementation of the electronic surveillance order. In point of fact, Judge Clarie found that the Government action, rather than ignoring his concerns, were taken in direct response to his concerns, and did not violate his order (Ruling on Motion to Suppress, App., pp. 112-113). It is presumptuous of the Appellants to imply, as they do, that the District Court could not objectively find facts and apply the law to events which involved some participation on its part. The hypothesizing indulged in by the Appellants clearly is insufficient to justify recusal, see, e.g. United States v. Mainello, 345 F.Supp. 863, 882 (E.D.N.Y. 1972); United States v. Garramone, 374 F.Supp. 256, 258 (E.D.Pa. 1974). Under these circumstances the denial of the Motion to Disqualify was not a clear abuse of judicial discretion and should be upheld.

ARGUMENT VIII

THE INITIAL JOINDER OF THE APPELLANTS WAS PROPER,
THE APPELLANT DiBENEDETTO HAS MADE AN INSUFFICIENT SHOWING
OF PREJUDICIAL SPILLOVER, AND APPELLANTS VOLPE
AND DiBENEDETTO DID NOT MAKE A SUFFICIENT SHOWING,
REGARDING THE EXCULPATORY TESTIMONY OF CO-DEFENDANTS, TO
SUPPORT A FINDING THAT THE DISTRICT COURT'S DECISIONS
ON SEVERANCE AND ORDER OF TRIALS WERE A
CLEAR ABUSE OF DISCRETION

The indictment in this case charged Michael O'Brien and Anthony Volpe with conducting and conspiring to conduct an illegal enterprise, the purpose of which was illegal gambling and debt collection through a pattern of racketeering activity, which included bookmaking, extortion, obstruction of justice, and the collection of unlawful debts, in violation of Sections 1962(c) and (d) of Title 18, United States Code (Counts One and Two). Counts Three and Four charged that Volpe, O'Brien, and numerous others, including Lawrence DiBenedetto, had participated, and conspired to participate in an illegal gambling business in violation of Sections 1955 and 371 of Title 18, United States Code. Count Five charged that Volpe and DiBenedetto had conspired to use extortionate means to collect an extension of credit in violation of Section 894 of Title 18, United States Code. Count Six was an extortion charge against O'Brien (Section 894), and Count Seven was a Section 894 conspiracy charge involving O'Brien, Jack Sullivan, and Francis Campanelle. The last count, number Eight, charged that Mr. Volpe had corruptly endeavored to influence a

witness to not testify before the grand jury, which was investigating the affairs of he and Mr. O'Brien, in violation of Section 1503 of Title 18, United States Code. It is important to note that Counts Three, Five, Six, Seven and Eight were all specified in Counts One and Two as the acts making up the required pattern of racketeering activity.^{28/} In sum, the Appellant O'Brien was named as a defendant in six of the eight counts; the Appellant Volpe was named as a defendant in six counts; the Appellant Di-Benedetto was named in three counts; the so-called gambling defendants were named in two counts;^{29/} and Sullivan and Campanelle were named in only one count.

The clear thrust of the indictment is that O'Brien and Volpe were an "enterprise", and, as such, they conducted a gambling and debt collection business.^{30/} They were, without question, the central figures in the charged illegal activity. Other individuals, however, played roles of varying significance in the activities of the enterprise.

^{28/} Two additional acts, the Rydel extortion (Count One, para. 2(b)) and the collection of a usurious loan (Count One, para. 3), were claimed as part of the pattern of racketeering activity, but were not charged as substantive counts. The Rydel extortion was the subject of a separate indictment (H-75-123), naming four defendants, including O'Brien. One defendant pled guilty prior to the trial in this case, and, subsequent to this case, O'Brien and the other two defendants pled guilty after a jury had been selected and trial began.

^{29/} The exception was William Grant who was only named in Count Three, the substantive gambling count.

^{30/} The proof showed that the enterprise not only collected debts arising out of its own activities (e.g., gambling, loan sharking), but also assisted in the collection of debts owed to others (e.g., the Rydel extortion, the DeMirs extortion).

THE APPELLANTS WERE PROPERLY JOINED
UNDER RULE 8(b)

Prior to examining the various specific claims of prejudice, it is important to determine whether joinder was initially proper. Rule 8(b) of the Federal Rules of Criminal Procedure states:^{31/}

"Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count." (emphasis added).

In discussing the question of proper joinder under Rule 8(b), a District Court stated:

"[T]he question is whether the conduct on which each count is based is a segment of factually related transactions constituting, in essence, a common scheme in which all defendants, at some point, participated." United States v. Isaacs, 347 F.Supp. 743, 761 (N.D.Ill.E.D. 1972) (emphasis added).

Similarly, this Court has held that joinder under Rule 8(b) is proper if the defendants "are alleged to have participated in the same series of acts which are part of a common scheme or plan, or connected together". United States v. Bernstein, 533 F.2d 775, 789 (2d Cir.), cert. denied, 429 U.S. 998 (1976); see also, United States v. Scott, 413 F.2d 932, 934-935 (7th Cir. 1969)

^{31/} The Appellant Volpe does not challenge the propriety of the joinder of the offenses under Rule 8(b).

(test of whether the acts are part of a series of transactions depends on the existence of a common plan). That case involved a conspiracy count in which all the substantive counts were alleged as overt acts, but it is not necessary that there even be a conspiracy count. See, United States v. Scott, supra, 413 F.2d at 934; cf. Schaffer v. United States, 362 U.S. 511, 514-515 (1960); United States v. Miley, 513 F.2d 1191, 1209 (2d Cir.), cert. denied, 423 U.S. 842 (1975). Nor, as a reading of the statute makes clear, is it necessary for all the defendants to be named in each count. The proposition is that " . . . if the defendants' acts are a part of a series of transactions, it is not necessary . . . that all the defendants be charged in the same count or that the evidence show that each defendant participated in precisely the same act". United States v. Laca, 499 F.2d 922, 925 (5th Cir. 1974); see also, United States v. Roselli, 432 F.2d 879, 899 (9th Cir.), cert. denied, 401 U.S. 924 (1971). The Fourth Circuit has held that the term transaction " . . . may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship". Cataneo v. United States, 167 F.2d 820, 823 (4th Cir. 1948). It is also important to note that the statute focuses on "allegations", as is fitting in a rule dealing with a pre-trial matter. On this point, this Court has stated:

"It is well settled that the initial joinder of defendants is permissible under Rule 8(b) of the

F.R.Crim.P. if the defendants 'are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses,' 18 U.S.C. Rule 8(b), unless the charge of a concert of action was included in the indictment in bad faith, because it was alleged without 'reasonable expectation that sufficient proof would be forthcoming at trial'." Stern v. United States, 409 F.2d 819, 820 (2d Cir. 1969) (citation omitted).

It is not, as Appellants allege, a rule of law that dismissal or acquittal (under Rule 29(a), F.R.Crim.P.)^{32/} on one or more joined counts automatically makes the initial joinder improper. See, United States v. Papadakis, 510 F.2d 287, 300 (2d Cir.), cert. denied, 421 U.S. 950 (1975).

Applying the above-stated principles to the facts and circumstances of this case, we believe that the initial joinder was permissible as to the Appellant DiBenedetto. The nub of the indictment was the illegal gambling business, and its corollary debt collection, centering at 103 New Britain Avenue in Hartford. The Appellant DiBenedetto was named in both Count Three and Count Four, which reflected, respectively, that he participated, and conspired to participate, in an illegal gambling business. Those counts also named O'Brien and Volpe (along with others) as participants. DiBenedetto's role was specifically identified (in Count Two) as that of a layoff bookmaker doing business with

^{32/} Here, of course, Judge Clarie found the Government's evidence against DiBenedetto on all three counts sufficient to go to the jury.

O'Brien and Volpe. (See, Indictment, App., p. 8, para. 6(h)). He was named, in Count Five, as a co-conspirator with Volpe and Ronald DelMastro, an employee of O'Brien and Volpe whose function was to collect debts owed to the enterprise (Vol. XVII, pp. 1017-1018; Vol. XVIII, p. 1063), in a conspiracy to use extortionate means to collect a gambling debt. Counts Six and Seven, although they do not name DiBenedetto, also involve the methods used to collect the business's gambling debts. O'Brien, who is named in both these counts, was, of course, alleged to be a participant in the gambling business and was named in Counts Three and Four. Count One, the substantive RICO charge, cites the conspiracy between Volpe and DiBenedetto (the subject of Count Five) as a part of the alleged pattern of racketeering. In Count Two, the RICO conspiracy, DiBenedetto is not named as a defendant. He is, however, named as a co-conspirator. As indicated previously, his role was alleged to be a layoff book-maker. One of the overt acts concerned his discussion of the DeMirs debt (Count Five) with Volpe and DelMastro (Indictment, App., p. 9, para. p). Another overt act was a telephone discussion between DelMastro and DeMirs following the visit at DeMirs place of business (Indictment, App., p. 10, para. s). A third overt act (Indictment, App., p. 10, para. x) concerned a gambling-related telephone conversation between O'Brien and DiBenedetto (See, Govt. Exhibit 131 h) (this call was also

charged as overt act j in Count Four). Thus, we suggest, all the Counts^{33/} are based on an interrelated series of transactions.

The Government's position regarding the interrelationship was consistent throughout the proceedings in the case.^{34/} The Government's approach to the indictment is detailed in its consolidated Response to Motions for Severance (filed June 3, 1976) wherein it was stated, in pertinent part:

"[T]he government contends that the evidence at trial will show that all of the criminal acts charged in Counts One through Eight were performed to further, or to protect some aspect of, the illegal gambling and debt collection business being conducted by the defendants in the IGB [Illegal Gambling Business] counts. The extortion alleged in Count Seven [sic] involved the attempted collection of a gambling debt owed by George DeMirs to LAWRENCE DIBENEDETTO, who will be shown to have been an integral part of the illegal gambling business in the IGB counts. The extortions alleged in Counts Six and Seven, involving attempted collections of gambling debts owed by Robert Hames and Joseph Barresi to MICHAEL T. O'BRIEN, will be shown to have involved debts to the gambling business alleged in the IGB counts . . . [T]he government will establish that the IGB defendants knowingly engaged in an illegal business which by its very nature created numerous debts that could not be legally enforced, we shall establish that threats of violence or force were the primary means by which the business ensured itself against large uncollected debts . . . The use and threat of violence in the instant case are not unrelated acts of a

^{33/} Count Eight is not included in this discussion since it was severed at the beginning of trial.

^{34/} The Government did, however, offer its thoughts on various groupings of defendants and counts in the spirit of assisting the Court.

defendant designed to accomplish an objective totally removed from the IGB counts. The extortionate acts were performed to collect gambling debts owed to one of the IGB defendants, a fortiori to the business itself. This will be borne out, for example, by the evidence in Count Five that VOLPE assisted in the planned use of threats against a debtor who owed a gambling debt to defendant DI BENEDETTO, a/k/a "Hammer", who in turn engaged in "layoff" activity with O'BRIEN, who controlled the overall operation, with VOLPE. We also intend to establish by testimony at trial that the relationship between bookmakers in an operation, in order for layoff wagering to run smoothly, depends upon the success of each bookmaker to function profitably and thus be in a position to accept wagering activity from each other. Obviously, bookmakers who are as central to an illegal gambling and debt collection business as O'BRIEN and his associates at 103 New Britain Avenue cannot provide the necessary assistance to their confederates in other parts of metropolitan Hartford if large gambling debts go uncollected. If a defendant has knowingly participated in a gambling business where gambling debts are routinely collected and others in the same business periodically use threats or violence to collect business debts, then evidence of the latter's collection practices are admissible against the former to unravel that business in all its aspects. The collection of wagering debts in a layoff bookmaking operation is every bit as essential to and indicative of that business as the wagers themselves." (Response to Motions for Severance, Supp. App., pp. 81-85) (See also, Vol. VIII, pp. 65-70).

Prior to trial the Appellant DiBenedetto suggested to the Court that he be tried on Counts Three and Four (gambling) separately, and that Count Five be tried with Count Seven, which charged Sullivan and Campanelle with using extortionate means to collect a gambling debt (Vol. VII, p. 46-47; Vol. VIII, p. 70). Thus, he was then willing to be joined with a count that he now claims he was improperly joined with. Moreover, we believe that

the evidence of the methods used by the gambling business to collect debts, which is the substance of Counts Five, Six, and Seven, as well as being the primary thrust of Counts One and Two, and the substance of most of the pattern of acts contained therein, would have been admissible to show intent, knowledge, motive, and modus operandi in a trial of just the gambling counts. See, e.g. United States v. Crockett, 514 F.2d 64, 73 (5th Cir. 1975) (testimony of uncharged bribes "shed light on totality of circumstances" in conspiracy to obstruct justice); United States v. Santar o, 560 F.2d 448, 453 (1st Cir. 1977) (collecting debts from delinquent bookmaker accounts was an integral part of conducting illegal gambling business); United States v. Nakaladski, 481 F.2d 289, 296 (5th Cir.), cert. denied, 414 U.S. 1064 (1973) (evidence of uncharged extortionate acts admitted, in extortion case, to show (1) motive and intent, (2) method of business and overall modus operandi, and (3) the existence of a general conspiracy of which the conspiratorial and substantive offenses were integral parts); United States v. Haley, 452 F.2d 391, 396 (8th Cir.), cert. denied, 405 U.S. 978 (1972) (threats of use of force admitted in narcotics case on basis that government had right to prove, as part of overall conspiracy, planned use of violence to enforce sales because it was part of overall modus operandi); United States v. Bynum, 485 F.2d 490, 496 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974) (evidence of planned robberies

and murder were "part and parcel" of drug conspiracy); United States v. Scott, supra, 413 F.2d at 935. Even if it is assumed, for the purpose of argument, that there was, as to Appellant DiBenedetto, a misjoinder of counts, most, if not all, of the evidence from the other counts would have, we suggest, been admissible in Counts Three and Four, under the rationale set forth above, and, therefore, in this Circuit, the harmless error doctrine would apply.

"[T]his court has concluded that when evidence tending to prove the charge that should have been severed would nevertheless have been admissible at the trial of the objecting co-defendant, and was admitted subject to appropriate limiting instructions, any error was harmless." United States v. Turbide, 558 F.2d 1053, 1061 (2d Cir. 1977);^{35/} see also, United States v. Roselli, 432 F.2d 879, 901 (9th Cir.), cert. denied, 401 U.S. 924 (1971).

If the Court were to find that the initial joinder was indeed improper, we believe the harmless error doctrine could appropriately be applied. The Government's position is, however, that initial joinder was proper, and that Appellant's remaining contentions must be considered in light of Rule 14 of the Federal Rules of Criminal Procedure.

^{35/} Judge Clarie gave the appropriate instructions (Vol. XXIV, pp. 2275, 2276). It was also pointed out, on numerous occasions, throughout the trial, that certain evidence was not being offered against DiBenedetto. See, United States v. Turbide, supra, at 1062, fn. 8. That the jury followed his instructions is best evidenced by the fact that they acquitted the Appellant on two counts. See, United States v. Papadakis, supra, 510 F.2d at 300-301. The evidence against DiBenedetto on the extortion count, set forth in Argument IX, was overwhelming.

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION
IN DENYING APPELLANTS' REQUESTS REGARDING
SEVERANCE AND ORDER OF TRIAL

Rule 14 reads, in pertinent part:

"If it appears that a defendant or the Government is prejudiced by a joinder of offenses or of joinder of offenses or of defendants in an indictment . . . or by such joinder for trial together, the court may order . . . separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires." (emphasis added).

Two precepts are clear from the plain meaning of the statute:

(1) severe prejudice must be clearly demonstrated, and (2) the granting of a severance or other relief is discretionary. See, United States v. Park, 531 F.2d 754, 761 (5th Cir. 1976); United States v. Crisona, 271 F.Supp. 150, 153-154 (S.D.N.Y. 1967). On the question of appellate review of Rule 14 claims, this Court has held:

"[T]he trial Court enjoys a wide discretion in the matter of granting or denying separate trials for defendants jointly charged and its decision will be set aside only upon a clear showing of abuse of discretion." United States v. Jenkins, 496 F.2d 57, 68 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975).

The Appellants raise two main issues from which they claim prejudice. They jointly claim that they were prejudiced by being denied the exculpatory evidence of co-defendants, and the Appellant DiBenedetto claims prejudicial "spillover". Turning first to the "spillover" issue, we will not attempt to make a point by point

rebuttal of the Appellants' myriad examples of alleged prejudice, because the issue is, we believe, quite simple to resolve.

The Appellant relies largely on United States v. Kelly, 349 F.2d 720 (2d Cir. 1975) to support his arguments. The claim that Kelly, Id., is controlling, however, is plainly incorrect. The Appellant in Kelly had been convicted on all counts in a trial that went on for three months before his name was ever mentioned. United States v. Kelly, supra, 349 F.2d at 759. Moreover, the Court found that "clearly inadmissible hearsay" had been admitted against the defendant which was, in the Court's view, devastatingly prejudicial to him. United States v. Kelly, supra, 349 F.2d at 758-759. The Court obviously felt that there had been spillover which the jury had been unable to disregard. Here, however, the Appellant himself points out several instances in which the evidence he objects to was clearly not offered as to him. That the jury was obviously unaffected by the alleged prejudicial incidents is proven by the inescapable fact that they acquitted him on two of the three counts that he was charged with. See, United States v. Papadakis, 510 F.2d 287, 300-301 (2d Cir.), cert. denied, 421 U.S. 950 (1975); United States v. Corr, 543 F.2d 1042, 1053-1054 (2d Cir. 1976); United States v. Brown, 335 F.2d 170, 172 (2d Cir. 1964); Gordon v. United States, 438 F.2d 858, 879 (5th Cir.), cert. denied, 404 U.S. 828 (1971). Moreover, although the Appellant characterizes the Government's

case on Count Five as "weak" (Appellants' Brief, p. 79), we respectfully suggest that a review of the evidence, the sufficiency of which is unchallenged, will show that the proof was overwhelming. See, Argument IX, infra. Not only did Ronald DelMastro testify to the events of the DeMirs extortion, but the victim himself established existence of the debt,^{36/} and corroborated DelMastro's testimony concerning the visit. The extortion was further corroborated by tapes of conversations that DelMastro had with DeMirs and with DiBenedetto concerning the debt and the collection efforts (Govt. Exhibit 126-A; 126-D; 131-A; 131-B; 131-D). Since the jury clearly was able to "compartmentalize the evidence and distinguish it among the . . . defendant", United States v. Corr, supra, 543 F.2d at 1053, and since the evidence on Count Five was "strong" and fully supportive of the verdict, see, United States v. Jenkins, supra, 469 F.2d at 70, we do not believe that the Appellant is able to carry his burden of showing prejudicial spillover so severe as to deny him a fair trial.

The Appellants Volpe and DiBenedetto, in their joint severance claim, argue that they were denied the opportunity to present exculpatory testimony from co-defendants. A review of the Appellants' arguments leads one to conclude that co-defendants

^{36/} On cross-examination, DiBenedetto's counsel did not attempt to challenge DeMirs on the existence of the debt, but rather tried to portray him to the jury as a welsher (Vol. XX, pp. 1538-1540).

were chomping at the bit to give exculpatory evidence and that Judge Clarie capriciously denied them the opportunity to do so. The facts are radically different from the impression the Appellants attempt to foster. It is therefore important to review the record prior to discussing the law on this point.

The Appellant DiBenedetto states that he "argued that the joint trial deprived him of his constitutional right to obtain exculpatory evidence of co-defendants", (Appellants' Brief, p. 69), and he cites to Vol. VIX, pp. 11-14 of the record. His counsel's argument to the District Court on this point is worth citing in full:

"And, in addition, after you have created this prejudice, by the way the Government has charged, you then deprive him of his constitutional right to confrontation, self-incrimination, and his right to present exculpatory evidence, because of the fact that there is a joinder of the three defendants in this case." (Vol. VIX, p. 14).

On the day trial started, counsel for DiBenedetto told the Court that he had been informed by counsel for Volpe that if Mr. Volpe was not on trial he would testify on Mr. DiBenedetto's behalf and give exculpatory evidence.^{37/} These statements represent, as far as the Government can determine, the sum total of information given to the District Court, prior to the start of trial, on the issue of co-defendants giving exculpatory evidence. It should be noted that at no time was the Court told what the exculpatory testimony would be, or what counts it would effect. On July 5,

^{37/} On an earlier occasion, counsel for Volpe did not know whether he would even testify on his own behalf (Vol. VII, p. 34).

1977, prior to sentencing, counsel for DiBenedetto told the Court, in the context of discussing Count Five, that Volpe could have given exculpatory evidence. Again no explanation was given as to what the evidence would have been. Indeed, it is difficult to see how Mr. Volpe could have rebutted DelMastro and Demirs' testimony concerning the visit to DeMirs by DiBenedetto and DelMastro, or the tapes which corroborated the debt, the visit, and the collection efforts. As will be discussed subsequently, we do not believe the Appellant DiBenedetto is able to meet the criteria necessary for severance on this ground.

The Appellant Volpe also claims he was prejudicially denied the exculpatory testimony of co-defendants. Of course, it should be pointed out that, at least initially, he desired to be tried with all co-defendants on Counts One through Four (Vol. VII, pp. 30-32). As a fallback position, if the "gambling defendants" were severed, the Appellant wanted the other defendants (those named in Counts Two and Four) to go to trial first. Counsel stated to the Court:

" . . . and we are prepared, and it may take me a little while to do it, but I am prepared to submit to your Honor affidavits -- I probably would want to do it in camera -- to the effect that we intend to call a number of these people that the Government now wants to try later. We want to call them as witnesses on Mr. Volpe's behalf, that he was not the head of this organization; that he had nothing to do with the organization; and he was not involved in running an illegal gambling enterprise." (Vol. VII, p. 34).

Judge Clarie was not told who would be called, and, although he was told what Mr. Volpe's purpose would be in calling "them", he was not told that they would in fact testify or what information they had that would be exculpatory. Nor did counsel state that the individuals, whoever they were, wouldn't be willing to testify even if Volpe were tried first. Shortly thereafter, counsel for Mr. Volpe raised the question of the Court ordering immunity for witnesses called on Volpe's behalf. (Vol. VII, pp. 35-36).^{38/} Finally, the initial position was re-emphasized, which was that Volpe wanted to go to trial with the same defendants he claimed he would call, in a separate trial, to exculpate him (Vol. VII, p. 38). Apparently none of the so-called "gambling defendants", however, wanted to be tried with any of the Counts involving O'Brien and Volpe (Vol. VII, pp. 21-22), and they did not want to be tried first (Vol. VII, pp. 22-23).

On April 12, 1977, the day the jury was selected, counsel for Mr. Volpe stated that John Sullivan, who was charged in Count Seven and was also represented by the same counsel, would testify for Volpe if his count (Seven) was severed from the others (Vol. VIII, p. 31). Counsel was not sure what Sullivan's position would be at a joint trial, but he stated that Sullivan probably would testify for Volpe (Vol. VIII, pp. 31-32). He stated that

^{38/} We believe this indicates the uncertainty of the representations made that co-defendants would willingly testify.

Sullivan "would exculpate Mr. Volpe on other matters that Mr. Volpe is charged with (Vol. VIII, p. 32).^{39/} It was also stated that Mr. Volpe would call Mr. O'Brien and Mr. DiBenedetto (Vol. VIII, p. 33). When questioned by the Court concerning their positions, counsel for Volpe responded that he "anticipated" that they would take the Fifth Amendment if called at a joint trial. Although counsel for the other defendants were present, no information was offered as to whether they would, in fact, testify at a separate trial of Mr. Volpe. Counsel went on to state that Volpe would call at least six of the "gambling group defendants" (who would testify for Mr. Volpe were he tried after them). (Vol. VIII, pp. 34-35). Counsel stressed, however, that at least two of these defendants would testify for Mr. Volpe "in either event". (Vol. VIII, p. 35) (emphasis added).^{40/} None of the individuals were identified, and no information was offered as to what they would testify to that would exculpate Mr. Volpe. At no point in the pre-trial or trial record did counsel for any co-defendant volunteer to confirm that DiBenedetto or O'Brien would testify if Volpe were tried separately (and obviously after them), or that any gambling defendant would testify for Mr. Volpe if they were tried first.

^{39/} It should be noted that Sullivan was severed, but was not called to testify for Mr. Volpe.

^{40/} No co-defendants were called by Mr. Volpe at trial.

On July 5, 1977, prior to sentencing, counsel for Volpe told the Court that he had been denied exculpatory testimony from DiBenedetto and O'Brien, and that:

"he was denied the testimony of . . . at least four of the men, integral men, involved in the gambling - John DellaFerra, also known as 'Baskets', Charles Boornazian, and Eugene Poulin." (Vol. XXV, p. 13).^{41/}

Counsel stated that DellaFerra would have testified that Volpe was not a part of the gambling business, and would have contested the testimony of Ronald DelMastro on one particular point (Vol. XXV, p. 15). Details of the testimony that Boornazian and Poulin would have given were not offered. It was also stated that John Lepito would have testified that a debt owed Mr. Volpe did not involve interest (Vol. XXV, p. 15).^{42/} In this regard, it should be noted that Mr. Volpe did call several witnesses who had borrowed money from him and they all testified that no interest was involved (Vol. XXV, p. 16). The jury obviously chose not to

^{41/} At the close of all the evidence, counsel stated to the Court that John Lepito, DellaFerra, and Poulin had changed their minds about testifying for Mr. Volpe on the advice of their attorneys. The comment was made in the context of a discussion of the Court's charge. This was the first occasion in which any of the gambling defendants were specifically identified. No comment was made as to what their testimony would have been (Vol. XXIII, pp. 2248-2250).

^{42/} Counsel for Volpe stated that they had represented in earlier motions what Mr. Lepito's testimony would be (Vol. XXV, p. 15). The Government has been unable to find any such representation, oral or written, in the record of this case. We assume, therefore, that counsel was referring to earlier references to unidentified co-defendants and unspecified exculpatory testimony.

believe them. Finally, reference was made to James Smuckler, who allegedly would have testified to Volpe's non-involvement in gambling (Vol. XXV, p. 17). Smuckler was not a co-defendant however, and at the time of this trial he was awaiting trial on perjury charges stemming from the investigation of O'Brien and Volpe's activities. The thrust of his indictment was that he had lied, while under a grant of immunity, when questioned, concerning Anthony Volpe's involvement with Betty Beaulieu in the receipt and sale of stolen clothing. Since Smuckler was not a co-defendant it is difficult to understand how the order of trials or denial of severance could have any bearing on whether he testified. In fact, the Court instructed the jury that counsel had agreed that Smuckler was not available as a witness to either side (Vol. XXIV, p. 2267). These then are the facts that serve as the basis for the Appellants' respective arguments.

The key case cited by Appellants is United States v. Echeles, 352 F.2d 892 (7th Cir. 1965). In that case, as pointed out by Appellants, Echeles was not able to call a co-defendant, Arrington, to give exculpatory testimony because his motion for severance was denied. The Seventh Circuit found that the denial constituted reversible error. The Appellants cite that portion of the Seventh Circuit's opinion wherein the Court stated:

"Speculation about what Arrington might do at a later Echeles trial understandably would be a matter of some concern to Echeles, but he should not be foreclosed of the possibility that Arrington would testify in his behalf merely because that eventually was not a certainty." United States v. Echeles, supra, 352 F.2d at 898.

The Appellants do not point out, however, that Arrington had previously exculpated Echeles three times in open court. United States v. Echeles, Id. Thus, it was extremely unlikely that, if a severance were granted, Arrington would have refused to testify at Echeles' trial. United States v. Finkelstein, 526 F.2d 517, 525 (2d Cir. 1975), cert. denied 425 U.S. 960 (1976). Obviously, questions such as those raised here must be decided on a case by case basis with no hard and fast rules being applicable, see, Byrd v. Wainwright, 428 F.2d 1017, 1018 (5th Cir. 1970), but Courts have attempted to set standards for guidance. Such a case, in this Circuit, is United States v. Finkelstein, 526 F.2d 517 (2d Cir. 1975), where four such factors were set out:

"(1) [t]he sufficiency of the showing that the co-defendant would testify at a severed trial and waive his Fifth Amendment privilege . . . (2) the degree to which the exculpatory testimony would be cumulative . . . (3) the counter arguments of judicial economy . . . and (4) the likelihood that the testimony would be subject to substantial, damaging impeachment." Id. at 523-524 (citations omitted).

We believe that the Court in Finkelstein omitted a crucial factor because of the particular facts of that case.^{43/} That factor, we suggest is whether the anticipated testimony will, in fact, be exculpatory. See, e.g. Byrd v. Wainwright, supra, 428 F.2d at 1020; United States v. Crisona, supra, 271 F.Supp. at 154 (No

^{43/} The Court set out factors to be considered "without purporting to delimit the trial court's field of inquiry". United States v. Finkelstein, supra, 526 F.2d at 523.

facts furnished as to the nature, extent, and importance of the exculpatory testimony). Here we would suggest that there was an insufficient showing that co-defendants would in fact testify.

In DiBenedetto's case, as pointed out above, the only claim made was that a joint trial with Volpe and O'Brien would deprive him of exculpatory evidence. At no time prior to July 5, 1977 (sentencing) was it asserted, in either oral or written form, that these co-defendants would in fact testify at a separate trial. This type of "bold conclusory statement" is insufficient. United States v. Crisona, supra, 271 F.Supp. at 154. In Appellant Volpe's case, it was initially made clear (March 22, 1977) that his primary position was that he wanted to be tried with all the defendants on the first four counts. As a fallback, he wanted to be tried after the gambling defendants (and, we assume, separately from O'Brien and DiBenedetto since he later made a claim that they could exculpate him). Thus, the District Court was faced with a defendant saying, in essence, that without the testimony of co-defendants he could not receive a fair trial, but that he wanted to be tried under circumstances that would negate any possibility of such testimony - a clearly contradictory posture. While counsel for Volpe stated that he would ultimately submit to the Court affidavits of intent to call co-defendants as witnesses, the record is not clear as to whether he was also prepared to submit affidavits of co-defendants stating that they would be willing to testify (Vol. VII, p. 34). In Finkelstein, the Court

intimated that such a procedure might be necessary, although the Court did not have to decide the issue. United States v. Finkelstein, supra, 526 F.2d at 524; cf, United States v. Crisona, 271 F.Supp. at 154 (factual basis required); United States v. Gleason, 259 F.Supp. 282, 283 (S.D.N.Y. 1966) (affidavits produced). In any event, the [redacted] was not informed at the time even of the identity of the [redacted] defendants that Volpe would call, much less whether or not they would in fact be willing to testify. Subsequently, on April 12, 1977, co-defendants O'Brien, DiBenedetto and Sullivan were identified as individuals that Volpe wanted to call on his behalf. No representation was made, so far as DiBenedetto and O'Brien were concerned, that they would testify at a separate trial. Counsel for Mr. Volpe was not even able to state affirmatively that they would refuse to testify in a joint trial (Vol. VIII, p. 34). Although counsel also represented Sullivan, he was not able to state positively whether Sullivan would testify if Volpe went first, but he "probably" would (Vol. VIII, p. 32). Counsel went on to state that six unidentified gambling defendants would be called, but, as to four of them, no averment is made as to whether they would testify if their trial preceded Volpe's. Even if such defendants were tried first, they might decide to invoke their privilege. See, Byrd v. Wainwright, supra, 428 F.2d at 1022 ; United States v. Esposito, 423 F.Supp. 908, 911 (S.D.N.Y. 1976). The position was undercut, we believe, by counsel's representation that at least two of the

defendants would testify in Mr. Volpe's behalf regardless of whether they went to trial before or after Mr. Volpe.^{44/} Thus, Judge Clarie was made aware that Mr. Volpe had available at least two witnesses whom it was presumably felt would take out of the gambling business, thereby alleviating, if not eliminating, the claim of prejudice. It must be remembered that Mr. Volpe had been aware for some months that the Court was likely to try Mr. O'Brien and Mr. Volpe first (Vol. XIII, p. 39), yet Judge Clarie was faced with an order of trial problem on the very day a jury was to be picked in Mr. Volpe's case.^{45/} Presumably Judge Clarie was also still aware of Mr. Volpe's earlier representations that he desired to be tried with the gambling defendants. Under these circumstances, there was not a sufficient showing that DiBenedetto, O'Brien, Sullivan, and the four unidentified gambling defendants, would in fact testify if a severance and different order of trial was granted.

More striking, however, was the failure to specifically inform the Court how the alleged testimony would exculpate Mr. Volpe. The alleged testimony was, for the most part, simply

^{44/} The uncertainty of all of Appellants' claims before trial can be best judged by the fact that no co-defendant testified on Mr. Volpe's behalf at trial.

^{45/} No formal motion for severance was filed on behalf of Mr. Volpe until the same day.

described as being exculpatory.^{46/} It has generally been held that the "movant must make a clear showing of what the co-defendant would testify to". Byrd v. Wainwright, supra, 428 F.2d at 1020 (movant's assertions concerning the importance of the co-defendants' testimony made "with full exploration of the reasons"); United States v. Finkelstein, supra, 526 F.2d 523 (Trial Court informed of specific information claimed as exculpatory); United States v. Papia, 560 F.2d 827, 837 (7th Cir. 1977) (co-defendant specified information that movant claimed as exculpatory); United States v. Rosa, 560 F.2d 149, 156 (3d Cir.), cert. denied, U.S. (1977) (vagueness of offer as to exculpatory nature of anticipated testimony was a factor in upholding denial of severance); United States v. Diez, 515 F.2d 892, 903 (5th Cir. 1975), cert. denied, 423 U.S. 1052 (1976) (unelaborated conclusory statement insufficient); United States v. Shuford, 454 F.2d 772, 778 (4th Cir. 1971) (Trial Court aware of precise content of expected testimony and its importance; denial of motion reversed); United States v. Crisona, supra, 271 F.Supp. at 154 (no facts furnished as to the nature, extent and importance of alleged exculpatory testimony; severance denied); United States v. Gleason, supra, 259 F.Supp at 283 (Trial Court aware that co-defendant had in the past given written and oral exculpatory

^{46/} At one point, on March 22, 1977, counsel for Volpe did state that he wanted to call co-defendants to elicit testimony that Mr. Volpe was not a part of the gambling business (Vol. VII, p. 34). This was the most specific statement he made on the subject until after Volpe had been convicted.

statements concerning movant; severance granted; motion granted); United States v. Kaufman, 291 F.Supp. 451, 453 (S.D.N.Y. 1968) (affidavit in support of motion lacked sufficient detail; motion denied).^{47/} Potential testimony which may seem critical and exculpatory to a defendant, may, in fact, turn out to be "of negligible weight or probative value", Byrd v. Wainwright, supra, 428 F.2d at 1021, or it may simply be cumulative.^{48/} It is not the function of the trial court to indulge in speculation on these questions. See, United States v. Crisona, supra, 271 F.Supp. at 154. The burden is on the moving defendant. While judicial economy and duplication of proof are important factors to be considered, a substantial showing that co-defendants would testify and that their testimony would clearly be relevant and exculpatory, should, rightfully, outweigh mechanical considerations. However, where such a showing is not made, and where, as here, four trials would have been necessary to meet the needs of the Appellants,^{49/} with a concomitant massive duplication of proof,

^{47/} It is enlightening to compare the paucity of information offered the District Court on this severance issue, with the extensive statement of the reasons and facts supporting the requested severance of Count Eight, which was granted by the District Court. (See, Vol. XI, pp. 2370-2382, 2399-2405).

^{48/} We assume that Mr. Volpe sought testimony of co-defendants that he was not a part of the gambling business. In this regard, it must be reiterated that the District Court had been told that two of the gambling defendants, and probably Mr. Sullivan, would testify for Mr. Volpe.

^{49/} We suggest that to satisfy the defendants' competing interests it would have been necessary to try O'Brien, DiBenedetto, and the gambling defendants, separately, and then try Volpe.

the demands of efficient judicial administration and economy outweigh the Appellants' interest in severance. The burden was on the Appellants to show that they would be so prejudiced^{50/} by a joint trial that they would be denied a constitutionally fair trial. United States v. King, 49 F.R.D. 51, 53 (S.D.N.Y. 1970). They have not borne their heavy burden, in light of the negligible showing they chose to make to the District Court. They are not entitled to a perfect trial, only a fair trial. Cf. Byrd v. Wainwright, supra, 428 F.2d at 1021. This they received. In view of the standard of review - clear abuse of discretion - we respectfully request that the District Court's decisions on severance and order of trial, since it was in the best position to weigh the validity of the claims against the required expenditure of its resources, be allowed to stand and that the verdicts be affirmed.

^{50/} An indication that Mr. Volpe, at least, didn't feel he was prejudiced is shown by the fact that, after having heard the Government's evidence, he did not renew his motion for severance when the Government rested (Vol. XXII, pp. 1897-1914), nor when all the evidence was in (counsel did mention certain co-defendants changing their mind about testifying, but it was in reference to the Court's charge to the jury). (Vol. XXIII, pp. 2248-2251). Failure to renew Rule 14 claims at the close of the Government's case or at the conclusion of all the evidence ordinarily constitutes waiver of the claim. See, United States v. Lewis, 547 F.2d 1030, 1033 (8th Cir.), cert. denied, 429 U.S. 1111 (1977); United States v. Kaplan, 554 F.2d 958, 965-966 (9th Cir. 1977).

ARGUMENT IX

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON
THE NECESSARY ELEMENTS OF THE CONSPIRACY CHARGED
IN COUNT FIVE OF THE INDICTMENT

Count Five of the indictment charged that Anthony Volpe, Lawrence DiBenedetto, and Ronald DelMastro, an unindicted co-conspirator, had conspired to use extortionate means, specifically explicit and implicit threats, to collect an extension of credit from one George DeMirs. The District Court in its charge, recited the pertinent parts of the statute, Section 894, Title 18, United States Code, and then stated:

"In order to convict the defendants . . . you must find beyond a reasonable doubt that:

1, a plan or scheme to use extortionate means of an extension of credit, between the dates alleged in the indictment had been wilfully formed by Anthony D. Volpe, Lawrence DiBenedetto, and Ronald DelMastro;

2, that each defendant knowingly and wilfully became a member of that conspiracy;

3, that at least one of the conspirators thereafter committed at least one overt act in furtherance of some object or purpose of the conspiracy, as charged.

An extortionate means is any means which involves the use of violence to cause harm to the person or property of any person. In the crime of conspiracy it is not necessary to prove the actual use of extortionate means so long as extortionate means were anticipated, and an overt act in furtherance of the plan was committed.

Nor is it necessary that the threats, if you find one or more were made, actually placed George DeMirs

in fear of harm to himself or his property. Actual fear is not necessarily an element of the offense. You need only conclude, to find that a statement by a defendant was an extortionate means, that the statement was designed or reasonably calculated to induce fear, in the light of the surrounding circumstances, in the mind of an ordinary person.

It is the conduct of the defendant, not the victim's state of mind, to which the statute is directed." (Vol. XXIV, pp. 2301-2303).

The Court next explained the term "extension of credit", in the context of the case, and then instructed the jury to follow and apply his earlier instructions concerning the general nature of a conspiracy (See, Vol. XXIV, pp. 2293-2300). Finally, the Court stated:

"It is solely your prerogative to find if a statement made to a debtor constituted an express or implicit threat made in order to collect that debt. A statement may, by its expressed terms be an obvious threat. On the other hand, the statute forbids threats that are purposely couched in terms that would appear ambiguous to an innocent passerby, but which were calculated by the speaker to instill fear into the debtor, because of the context in which the statement was made." (Vol. XVIV, pp. 2303-2304).

While the Appellants' arguments are somewhat difficult to decipher, it appears that they are pressing two claims:

1. That Judge Clarie should have charged the jury that the victim's state of mind was a factor to consider in deciding whether implicit threats were made; and

2. That Judge Clarie failed to properly charge intent.

Before addressing these points, we wish to note that the Appellants state, on page 1 of their Brief, that they "are not challenging the sufficiency of the evidence" We take this to mean that they concede that the Government produced sufficient evidence on every count of the indictment, including Count Five, to support the jury's verdicts of guilty. Specifically, as to Count Five, the Appellants DiBenedetto and Volpe are conceding that the evidence was sufficient to prove their participation in a conspiracy to use implicit and explicit threats to attempt to collect a gambling debt. Nevertheless, they attempt to minimize, and, we believe, misinterpret, the evidence in order to bolster their arguments. It is therefore, important to briefly review, in the light most favorable to the Government, Glasser v. United States, 315 U.S. 60, 80 (1942), the evidence supporting the verdict.

The jury, in convicting Appellant Volpe on Count One, found that he was engaged in an enterprise, the purpose of which, among other things, was to collect illegal debts. The jury was entitled to find that Lawrence DiBenedetto, a bookmaker, came to Mr. Volpe for assistance in collecting a gambling debt from one George DeMirs (Vol. XVIII, p. 1114). Mr. Volpe authorized Ronald DelMastro, who collected debts for him (Vol. XVII, pp. 1017-1018; Vol. XVIII, p. 1063), to go to Meriden, Connecticut with Mr.

DiBenedetto to collect the money (Vol. XVIII, p. 1114). When they met with DeMirs, Mr. DiBenedetto indicated that DelMastro was from the "store".^{51/} DiBenedetto said the matter was "out of his hands" (Vol. XVIII, p. 1115; Vol. XX, p. 1528), and that part of the money was owed to someone else (Vol. XX, p. 1529). DelMastro recalled telling DeMirs that if he didn't come up with the money "something was going to happen to him" (Vol. XVIII, p. 1115).^{52/} As DelMastro and DiBenedetto were leaving, DeMirs was told that DelMastro would be back Thursday. DeMirs responded that it might be a wasted trip (Vol. XX, p. 1529). DiBenedetto got angry and said, "I ought to give you a belt", or "ought to give you a slap" (Vol. XX, p. 1530). When questioned as to his state of mind, DeMirs indicated that he, "wasn't too afraid at the time", but that he did consider the visit and statements made to be a threat (Vol. XX, p. 1547). When DelMastro returned, he told Volpe that he hadn't gotten the money. Mr. Volpe stated he "shouldn't have took any bull from him", and that DelMastro "should have gave him a crack, and got the money on the spot". (Vol. XVIII, p. 1117). Reviewing this evidence, it is difficult

^{51/} It was DelMastro's recollection that DiBenedetto used this terminology. DeMirs recalled DelMastro stating he had been sent by the "office" or "main office" (Vol. XX, p. 1528).

^{52/} DelMastro also recalled making reference to DeMirs "being the fifth wheel on a Volkswagen" if he didn't come up with the money. (Vol. XVIII, p. 1116).

to understand how the Appellants can reasonably claim that "it is uncertain whether the statements made by . . . DiBenedetto, were meant as implicit threats". (Appellants' Brief, p. 97). We believe that it is clear that the taking of DelMastro to meet DeMirs, introducing him as being from the "main office", and stating that the matter of the debt was out of DiBenedetto's hands, constituted an implicit threat. See, e.g., United States v. Keresty, 334 F.Supp. 461, 464 (W.D.Pa., 1971), aff'd, 465 F.2d 36 (3d Cir.), cert. denied, 409 U.S. 991 (1972). We also believe that the jury could find that the comments, to the effect that something would happen to DeMirs, and "I ought to belt you", were explicit threats. The jury could also find, as to Mr. DeMirs' state of mind, that he considered the visit and comments as threats, though he wasn't "too" afraid.

The Appellants, in making their arguments lose sight of an essential factor - that the offense was conspiracy, and not a substantive Section 894 offense. Judge Clarie specifically instructed the jury as to the elements of the conspiracy charged in Count Five (Vol. XXIV, p. 2301-2302), and referred the jury to his earlier general comments about the law of conspiracy (Vol. XXIV, p. 2303). The Court also quoted the pertinent parts of Section 894 (Vol. XXIV, p. 2301). The Court went on to define for the jury the terms "extortionate means" (Vol. XXIV, p. 2302) and "extension of credit" (Vol. XXIV, p. 2303). These instructions, we submit, accurately and correctly defined for the jury

the offense charged in Count Five. See, e.g. United States v. Gordon, 242 F.2d 122, 126-127, and fn. 2 at 126, fn. 4 at 127, cert. denied, 354 U.S. 921 (1957). The Court chose to exercise its discretion and amplify its instructions by offering guidance on "threats". See, United States v. Bayer, 331 U.S. 532, 536 (1947) (amplification of correct charge is discretionary). In doing so, the District Court chose language approved in United States v. Natale, 526 F.2d 1160 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976), over an instruction proposed by the Appellants, which was largely drawn from United States v. Curcio, 310 F.Supp. 351 (D.Conn. 1970).^{53/} In United States v. Natale, supra, this

^{53/} The proposed instruction, only a part of which is quoted in Appellants' Brief, was:

"In considering the Fifth Count, charging the defendant, Lawrence DiBenedetto, with conspiracy to commit extortion to collect a gambling debt by explicit and implicit threats of violence upon the person of the debtor, I charge you that in determining whether or not implicit threats were used, you must find, beyond a reasonable doubt, that:

'Acts or statements constitute implicit threats only if they instill fear in the person to whom they are directed or are reasonably calculated to do so in light of the surrounding circumstances and there is an intent on the part of the person who performs the act or makes the statement to instill fear.'

U.S. v. Curcio, 310 Fed. Sup. 351 at 357 (D.C.Conn. 1970), cited with approval in U.S. v. Natale, 526 Fed. 2d 1160 at 1168 (2d Cir. 1975).

'In other words, it is the conduct of the defendant, not the victim's individual state

(continued on next page)

Court held that actual fear, on the part of the victim, is not an element of the offense. United States v. Natale, supra, 526 F.2d at 1168. The Court went on to state:

"The approach chosen by the trial judge, to define the word 'threat' in the statute by reference to the reasonable apprehensions of an 'ordinary person' gives the statute a proper construction since it focuses the jury's attention on the evil being attacked -- the defendant's conduct . . . It is this 'calculated' use of threatening gestures or words to collect credit extensions which Congress has made criminal. Actual fear need not be generated, so long as the defendants intended to take actions which reasonably would induce fear in an ordinary person." United States v. Natale, Id.

Judge Clarie simply paraphrased this Court's language in Natale. See, United States v. Sears, 544 F.2d 585, 588 (2d Cir. 1976).

He addressed the question of intent by stating:

"You need only conclude, to find that a statement by a defendant was an extortionate means,

(Cont'd)

of mind to which the thrust of the statute is directed.'

U.S. v. Natale, supra, at 1168.

Therefore, you must find that the conduct of the defendant, Lawrence DiBenedetto, was part of an agreement to engage in conduct which would instill fear in Mr. DeMirs, or conduct which would be reasonably calculated to instill fear in the surrounding circumstances, and you must find this beyond a reasonable doubt in order to find a violation of the conspiracy and extortion statutes. If you do not find this conduct and an agreement to perform this conduct, then you must find the defendant, Lawrence DiBenedetto, not guilty." (Index to Record on Appeal, Document No. 48).

that the statement was designed or reasonably calculated to induce fear, in the light of the surrounding circumstances, in the mind of an ordinary person." (Vol. XXIV, p. 2302) (emphasis added).

Subsequently, the Court also stated:

"[T]he statute forbids threats that are purposely couched in terms that would appear ambiguous to an innocent passerby, but which were calculated by the speaker to instill fear into the debtor, because of the context in which the statement was made." (Vol. XXIV, pp. 2303-2304) (emphasis added).

Both the words design and calculate include "intend" among their definitions. See, Webster's Seventh New Collegiate Dictionary, 1971, pp. 117, 224. While Judge Clarie might have personalized this portion of the charge more, its context is certainly clear. Thus, the Appellants' position, we believe, boils down to substituting the word "intended" for the words "designed" and "calculated". In United States v. Sears, supra, a case dealing with a substantive 894 offense, this Court stated:

"It is [the] 'calculated' use of threatening gestures or words to collect credit extensions which Congress has made criminal. Natale, supra, at 1186. The trial judge had a duty to bring home to the jury the importance of this element of the crime." United States v. Sears, supra, 544 F.2d at 588.

That is exactly what the District Court tried to do in its charge. The significance of the issue is further reduced by the fact that the whole thrust of Appellants' argument is toward implicit threats, but, as indicated previously, the jury was entitled to find that explicit threats had been made to the debtor as well as implicit

threats.

The Appellants' second argument seems to be that the Court should have instructed that the defendant's state of mind is an important factor to consider. This argument, however, is without merit. In the first place, the Natale and Sears cases make it clear that the victim's state of mind is not an element of a substantive 894 offense, much less a conspiracy. Next, the same Court had " . . . emphasized that the jury was to consider all of the circumstances which surrounded the transaction in determining whether . . . [the] statements constituted threats under the statute". United States v. Sears, supra, 544 F.2d at 588. The Court of Appeals found that this was sufficient to balance that aspect of the instruction when indicated that it was the defendant's conduct that the statute was directed at. United States v. Sears, supra, 544 F.2d at 588. Judge Clarie also directed the jury's attention to the fact that the statements must be considered "in light of the surrounding circumstances". (Vol. XXIV, p. 2302). Moreover, the Appellants apparently would have been satisfied by the language of the Curcio case, which also uses the phrase "in light of the surrounding circumstances". United States v. Curcio, supra, 310 F.Supp. at 357; see also, Appellants' Brief, p. 94. Finally, after the charge was given, the Appellants objected only that the Court had not used their proposed Curcio charge which did not include any particularized comments on the importance of the victim's state of mind.

See, fn.53, supra. The issue is thus raised for the first time here. Rule 30 of the Federal Rules of Criminal Procedure, however, states:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

See, United States v. Pinto, 503 F.2d 718, 723 (2d Cir. 1974); White v. United States, 394 F.2d 49, 55 (9th Cir. 1968). Moreover, even assuming arguendo that the Court should have given more stress to the victim's state of mind as being part of the surrounding circumstances of the acts and statements, it is not an issue we suggest that can credibly be claimed as denying the Appellants a fair trial, thereby mandating sua sponte appellate review. See, Screws v. United States, 325 U.S. 91, 107 (1945).

Viewing the charge as a whole, cf. United States v. Nadler, 353 F.2d 570, 572 (2d Cir. 1965), the United States believes that the District Court's instructions on Count Five satisfactorily described the elements of the conspiracy charge, as well as the necessary aspects of the underlying offense, and we respectfully urge the Court to uphold the convictions on Count Five.^{54/}

^{54/} Assuming that the District Court's decisions on the suppression issues are upheld, we would like to note that this Court could exercise its discretion and refuse review on this issue, as to the Appellant Volpe, under the concurrent sentence doctrine. See, e.g. United States v. Romano, 382 U.S. 136, 138 (1965); United States v. Gaines, 460 F.2d 176 (2d Cir.), cert. denied, 409 U.S. 883 (1972). Mr. Volpe's sentence on Count Five was identical to, and concurrent with, his sentences on Counts One through Four.

CONCLUSION

The District Court properly refused to exclude the electronic surveillance evidence because suppression was not mandated by either the Fourth Amendment or the statute. The Court did not abuse its discretion in its decisions regarding severance and order of trial, and its charge to the jury was proper in all respects. After a long, hotly contested trial, the jury, as the triers of fact, found the Appellants guilty. Therefore, based on the foregoing arguments and authorities, the United States respectfully urges this Court to uphold the findings of the District Court and affirm the judgments of conviction.

Respectfully submitted,

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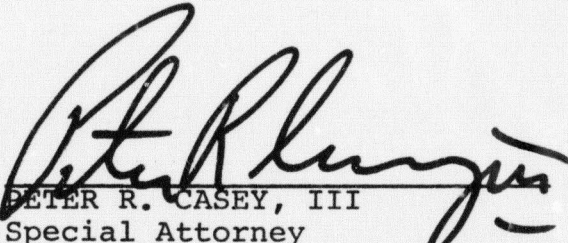
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